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In The

Supreme Court of the United States

ERNESTO MUTUC,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ERNESTO MUTUC
1900 Wilmette Avenue
Unit 4B
Wilmette, IL 60091

(847) 251-1038

Pro Se

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QUESTIONS PRESENTED

1. **Whether the Court of Appeals erred in sidestepping the appeals process and essentially deciding the appeal without jurisdiction when, after a review of the final order of the District Court and the record on appeal, the Court of Appeals denied the request for the Certificate of Appealability without issuing a single reason or opinion in support of its decision when the issue on the docket was the wrongful conviction of an innocent United States citizen as a result of a constitutionally flawed Government case founded entirely on the undisputed perjured testimonies of key government witnesses?**

2. **Whether the District Court abused its discretion and power in denying the Section 2255 as procedurally defaulted?**

3. **Whether the Court of Appeals erred in the direct appeal in affirming the trial court verdict without a *de novo* review of the rebutted Government case?**

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Ernesto Mutuc respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to

review its judgment below.

OPINIONS BELOW

The Order of the Court of Appeals denying the motion for a Certificate of Appealability is unreported and attached hereto as Appendix A. The Order and Statement of the District Court denying the motion for a Certificate of Appealability is unreported and attached hereto as Appendix B. The Judgment and Memorandum Opinion and Order of the District Court denying the motion to vacate sentence pursuant to 28 U.S.C. § 2255 is unreported and attached hereto as Appendix C. The Opinion of the Court of Appeals in the direct appeal is reported at 349 F.3d 930 (7th Cir. 2003) and attached hereto as Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 11, 2008. This timely petition for a writ of certiorari was subsequently filed by March 26, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution guarantees that no person shall "be deprived of life, liberty, or property, without due process of law". The concept of due process imposes a fundamental obligation upon all government

agencies, and especially upon officers of the courts

The Sixth Amendment of the Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury .... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

The marriage of Ernesto Mutuc to his former wife ended on May 2, 1994 in a hearing on her attorney James B. Pritikin's motion to enter judgment. The former wife was not present. The document was entered over the objections of Mutuc and his divorce attorney James Crowley. The Court had ruled as follows:

> "I'm going to go ahead and sign the judgment as presented and you could come in on a motion, a 1203 motion I suppose, to argue that it does not reflect the agreement of the parties or whatever. But then you'd have to present an affidavit and everything else. So I will sign this." (Transcript of the May 2, 1994 hearing, page 53).

The judgment was sent by Pritikin to Mutuc's employer Computer Associates directing the employer to release the balance of Mutuc's 401k pension plan to the former wife. The letter and

documents were returned with no action. Pritikin then sent a Qualified Domestic Relations Order (QDRO) to Computer Associates for the same purpose of releasing the 401k funds for the payment of the marital debts. On November 4, 1994 Computer Associates wrote the former wife informing her that the QDRO would not be qualified:

> "... until certain changes are made. Those changes were identified in a letter to James B. Pritikin, Attorney at Law dated September 1, 1994. (copy enclosed). To date we have not received a response to that letter." (Section 2255 Defendant's Reply Brief, Appendix E).

The agreement was unconscionable, with 41 percent of Mutuc's net pay garnished for support, 42 percent for the monthly minimum marital debt payments, and 17 percent for Mutuc's rent. This left Mutuc nothing for work related, daily living, and educational expenses for the family which still included the minor child and the other children in the divorce. Pritikin had refused to make the changes to the QDRO, instead opting to move the Court to force Mutuc to file for bankruptcy, borrow the entire 401k amount, or file an emergency motion to withdraw the funds. This was the start of the non-stop post-divorce litigations that culminated in the bankruptcy petition filed by Mutuc through his divorce and bankruptcy attorney George Jonscher on April 7, 1998.

There were two critical motions resolved in Pritikin's favor just before the bankruptcy. The first

ordered Mutuc to pay Pritikin's attorneys fees in spite of the fact that this was precluded in the divorce agreement. The second resulted in the funds being transferred to the former wife after Pritikin had finally re-written the QDRO as instructed by Computer Associates more than three years earlier. Despite the fact that Mutuc had obtained a separate Order stating that the 401k funds would be utilized for its original purpose, Pritikin told his client that she did not have to use the funds to pay the creditors.

At the hearing on Pritikin's attorney's fees, Mutuc disclosed the exercise of his 1987 stock options that were expiring around October 1997 and the fact that the options were already assigned to a third party just after the divorce. Pritikin filed a Section 2-1401 Petition on March 24, 1998 claiming that the options were concealed from the divorce. Jonscher filed a motion to dismiss arguing that the Section 2-1401 was already procedurally barred as untimely and that the former wife knew more about the options when they were granted than Mutuc who was then out of the country. Jonscher told Mutuc that the Section 2-1401 had placed all the marital assets on hold and back in the jurisdiction of the divorce court. Mutuc, in Florida on a job assignment, authorized Jonscher to continue with the bankruptcy and Jonscher, deciding on the chapter 7 filing, provided the totals, dated the forms, and filed the bankruptcy.

In early August, 1998 Mutuc received by regular mail the discharge of debt dated July 29, 1998. Pritikin filed the Motion for Rule 2004 on

August 3, 1998. The bankruptcy case was closed on August 4, 1998. On August 6, 1998 the Bankruptcy Court entered the Order for Rule 2004. Pritikin's attorney conducted the Rule 2004 Examination on August 27, 1998 after which Jonscher was immediately threatened with legal sanctions. Pritikin then filed a complaint against Jonscher with the Illinois Attorney Registration and Disciplinary Commission (ARDC).

On October 23, 1998 Pritikin filed a Motion for Sanctions Pursuant to Supreme Court Rule 137 against Mutuc and Jonscher. On October 28, 1998 Pritikin filed a Motion for Garnishment against Mutuc and the former wife for the payment of his attorney's fees from the $18,000 due Mutuc (Government Exhibit Mutuc Divorce 2, provision 1.3), not in Divorce Court but in Cook County Municipal Court, but still using the Mutuc divorce docket case number 91D18957. Mutuc filed a Motion to Quash, arguing that the attorney's fees were dischargeable debt. Mutuc filed pro se after Jonscher was coerced into withdrawing as counsel. Pritikin then falsely claimed in Municipal Court that the bankruptcy court had already adjudged his fees as non-dischargeable debt. Mutuc produced a bankruptcy court transcript disproving this claim. The Municipal Court then ordered both parties to have the bankruptcy court determine the dischargeability of Pritikin's attorney's fees. On February 25, 1999 Mutuc filed an Adversary Complaint and motion to declare Pritikin's fees dischargeable debt following instructions from the office of the Courtroom Deputy to Judge Susan Sonderby of the bankruptcy court. This became case

number 99-00197. On March 19, 1999 Pritikin filed a Motion to Dismiss.

Pritikin won his case and the $18,000 in Municipal Court on February 17, 1999 while Mutuc was on an extended work assignment in Panama City, Panama, arguing in court that Mutuc had failed to prosecute his case. This after the Municipal Court had specifically instructed Pritikin to work with Mutuc on the case schedule because of Mutuc's overseas assignment.

On March 25, 1999 the bankruptcy court allowed Pritikin's Motion to Dismiss without prejudice. This was incorrectly entered in the 99-00197 docket as an order with prejudice. Quite notably, Mutuc again had caught Pritikin on a lie that the Municipal Court had adjudged his attorneys fees as non-dischargeable. However, instead of denying Pritikin's Motion to Dismiss, the bankruptcy court simply told Mutuc that it would rehear Mutuc's case only when Mutuc gets an order in Municipal Court reversing its decision to award Pritikin's fees. Case Number 99-00197 was closed on March 26, 1999 without a ruling on the dischargeability of Pritikin's fees. Mutuc's motion for time to retain counsel was denied in Municipal Court on Pritikin's circuitous argument that Mutuc was already procedurally barred from any motion to reconsider.

Sometime afterwards two FBI agents visited Mutuc at his home accusing him of conspiring with Jonscher to defraud the creditors. Mutuc explained in detail the circumstances surrounding the divorce and bankruptcy, and the disruptive role Pritikin had

played in both. FBI agent John Diwic stated that the explanation sounded plausible but that he did not believe it.

The Order reopening Mutuc's bankruptcy case was entered two and a half years later on February 6, 2001. Despite the fact that Pritikin was a consultant to the Trustee in the reopened bankruptcy, the provisions for paying the debts from the marital assets at the disposition of the Divorce Court were never considered.

Mutuc retained Michael D. Walsh as counsel and was told by Walsh not to attend the second meeting of creditors and that he (Walsh) would "take care of everything". It was only much later that Mutuc found out that Walsh did not even attend the meeting of creditors on his behalf, and had not filed any counter-motion or argued the case in court.

Within this extended period Mutuc continued in his extensive travels as a banking software consultant, paid off the balance of over $87,000 in income taxes from the sale of the options, and continued in his role as head of his household which included the children from the divorce. He had to work out other financial arrangements with his sister because of continuing financial difficulties and pending divorce and bankruptcy court actions, but did not discuss the court matters with her because of the FBI investigation.

Also within this period, and unbeknownst to Mutuc, the Government had conducted a full investigation and interrogation of Jonscher without

a waiver in violation of the attorney-client privilege. Also unbeknownst to Mutuc as to its scope and nature, the Government was coercing Mutuc's sister and brother-in-law, her husband, into testifying against Mutuc, threatening them with abetting a supposedly ironclad case of divorce fraud, and telling them at the grand jury hearing that Mutuc had already received the $18,000 from the former wife.

The government thereafter indicted Mutuc on one count of filing a bankruptcy petition in furtherance of a scheme to defraud, 18 U.S.C. § 157; two counts of making false statements, under penalty of perjury, 18 U.S.C. § 152(3); and one count of making a false oath or account in a bankruptcy case, 18 U.S.C. § 152(2). Mutuc retained Attorney James R. Fennerty to replace Walsh. After a six day jury trial, Mutuc was found guilty. Fennerty immediately filed a motion to withdraw as counsel.

New counsel Brent D. Burley filed the direct appeal arguing that the combined actions of Pritikin, Jonscher, and Fennerty "had resulted in a miscarriage of justice and landed a model citizen behind bars." (See Appellant Brief, page 14). On November 21, 2003 the Seventh Circuit affirmed Mutuc's conviction and sentence.

Mutuc filed his Section 2255 *pro se* on September 16, 2004. The Memorandum Opinion and Order denying the Section 2255 was entered three years later on September 26, 2007. Mutuc filed his Notice of Appeal with appended Motion for Certificate of Appealability (COA) on October 19, 2007. This COA was denied on October 30, 2007.

Mutuc filed a COA with the Court of Appeals on November 7, 2007 arguing that the Constitutional violations resulting in a gross miscarriage of justice cannot be procedurally defaulted. This COA was denied, and the appeal terminated, on January 11, 2008. This appeal for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

Ernesto Mutuc had conducted all his affairs within the law and had relied on the advice and counsel of his attorneys throughout his divorce and subsequent efforts to seek bankruptcy protection in order to continue providing for his family and the education of his children in the face of an unconscionable divorce settlement agreement authored by Pritikin. He was wrongfully convicted by a jury deliberating on a straw-man case of "intent to defraud". He was defended by Fennerty who had abandoned Mutuc's affirmative defense and had admitted to the Court at sidebar that he was only going through the motions of defending his client, all the while assuring Mutuc of his objectivity, professionalism, and ability to present the full defense at the most appropriate time.

The dignity and trust of the United States Government can not and must not permit the conviction of an innocent citizen on not just tainted testimony but actual perjury, obstruction of justice, ineffective assistance of counsel, and a bogus case presented to an unwitting jury. Mutuc respectfully submits these serious matters of judiciary errors and abuse to the administrative authority and review of

the Supreme Court.

In a letter to James Madison from Paris after receiving a copy of the Constitution, Thomas Jefferson wrote that "..... a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference." Jefferson later suggested an additional reason for a bill of rights, namely: "the legal check which it puts into the hands of the judiciary" to protect individual rights. Madison would later champion and become most responsible for the passage and ratification of the first ten amendments to the Constitution: the Bill of Rights (Taken from the book *A More Perfect Union,* by William Peters, Crown Publishers, Inc., New York, 1987).

I. ERNESTO MUTUC WAS WRONGFULLY CONVICTED.

The Memorandum of Law in Support of Section 2255 Motion provided the actual value of the C-0028 options using the standard formula that even a fifth grader can understand and perform.

It took the Government three days, from the testimony of Mary Stravinskas as their first witness and the testimony of Pritikin at the last day to present to the jury their theory that the value of the stock options was the same in 1994 as it was in 1997.

There is no question that one party committed a lie, actually a huge and material lie, at the trial.

The Government said it was Mutuc. Mutuc had committed divorce fraud and was therefore guilty of "bankruptcy fraud in furtherance of a scheme to defraud." The wrongful sentence of Mutuc was in fact enhanced for perjury.

Mutuc said it was the Government and their witnesses that lied, and that the Government cannot now address this lie because it would unravel their entire case. The Government in fact would not provide the instances of perjury committed by Mutuc during the sentencing hearing, and completely omits the issue in their Section 2255 response.

A. The perjured testimony of government star witness Attorney James B. Pritikin meets all the definition and proof requirements of felony perjury charges prosecuted under 18 U.S.C. § 1623.

Pritikin had testified that Mutuc's employee stock options had the same value at the time they were granted as at the time they were exercised, that Mutuc had concealed these valuable assets at the time of the divorce, and that these valuable assets could have been used to pay off the marital debts. He made the false statements under oath to the jury at Mutuc's criminal trial, two of the four essential elements of perjury.[1]

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[1]See *United States v. Picketts*, 655 F.2d 837, 840 (7th Cir.) cert. denied, 454 U.S. 1056 (1981) on transcript as proof of oath; *United States v. Nixon*, 816 F.2d 1022, 1030 (5th Cir. 1987) cert. denied, 484 U.S. 1026 (1988) on common sense evaluation of false statements.

Government Exhibit Computer Associates 1, read correctly, shows that the alleged assets were worthless at the time of the divorce. The allegedly concealed certificates were also non-existent and no copies were provided at trial. The marital debts were resolved in the divorce settlement, a requirement for the granting of the no-fault divorce, from assets existing at the time of the divorce

The false information, used by AUSAs Jonathan King and Christina Egan throughout the trial and at the concluding statements and rebuttal to establish intent to defraud, had actually influenced and misled the proceedings. The false testimony was material to the Government case, the third essential element.[2]

The statements were made by Pritikin with a full knowledge of their falsity, the fourth essential element. Ample direct and circumstantial evidence from the divorce proceedings alone would prove that he actually knew the falsity. He also had the motive to lie as he clearly showed in abandoning the interest of his client in the assets in question and dragging the divorce matters into the adversarial court systems in order to pursue his personal vendetta against Mutuc and be paid his attorneys

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[2] See *United States v. Anderson*, 798 F.2d 919, 929 (7th Cir. 1986) on the broad definition of materiality; *United States v. Ostertag*, 671 F.2d 262 (8th Cir. 1982) on materiality to the subject of the case in general.

fees.[3]

B. The perjured testimony of government star witness Attorney James B. Pritikin meets all the definition and proof requirements of felony obstruction of justice charges prosecuted under 18 U.S.C. § 1503.

Any act designed to interfere with the process of arriving at an appropriate judgment in a pending case and which would disturb the ordinary and proper functions of the court can constitute an act which violates 18 U.S.C. § 1503.[4] Pritikin's perjured testimony was such an act.

The perjury and obstruction of justice also occurred in the same case and same venue. The same charges of divorce fraud and an additional charge of concealing $18,000 from the divorce were also the false foundation for Mutuc's indictment by the grand jury. These were also the same issues raised by Pritikin in divorce court. Federal court records would further show that Pritikin was a consultant to the bankruptcy case against Mutuc which was also rife with due process violations. Furthermore, these charges developed with the

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[3]See *United States v. Watson*, 623 F.2d 1198, 1206-1207 (7th Cir. 1980) on proof from circumstantial evidence; *United States v. Dudley*, 581 F.2d 1193, 1198 (5th Cir. 1978) on motive and specific intent.

[4]See *Haili v. United States*, 260 F.2d 744, 746 (9th Cir. 1958), *Falk v. United States*, 370 F.2d 472, 476 (9th Cir. 1966)).

AUSAs King and Egan concealed very specific divorce judgment provisions and status of divorce court actions and orders regarding the marital assets and marital debts, the same debts in the bankruptcy and criminal prosecution of Mutuc.

On the first of the three essential elements of the crime, Pritikin not only knew that a judicial proceeding was pending in a federal court; he had started the proceedings in both the bankruptcy and district courts.[5]

On the second essential element, Pritikin did not just simply know that his actions could lead to the seizure of Mutuc's assets and the conviction and incarceration of Mutuc; he knew that the assets were on hold and under the jurisdiction of the divorce court, and the funds for the creditors were in the disposition of the divorce court for implementation. Pritikin's actions on this regard may even be unprecedented. Regardless, he knew that his actions would obstruct justice.[6]

On the third element, Pritikin's personal vendetta against Mutuc started in divorce court and

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[5]See *Pettibone v. United States*, 148 U.S. 197, 206 (1893); *United States v. Baker*, 494 F.2d 1262, 1265 (6th Cir. 1974); *United States v. Metcalf*, 435 F.2d 754, 756 (9th Cir. 1970); *United States v. Walasek*, 527 F.2d 676, 678 (3rd Cir. 1975).

[6]See *Haili v. United States*, supra; *Falk v. United States*, 370 F.2d 472, 476 (9th Cir. 1966) cert. denied, 387 U.S. 926 (1967).

permeated his actions throughout the bankruptcy and criminal proceedings. As already stated, he did not only interfere with the judicial proceedings. He started it and sealed it with his perjured testimony at trial.[7] Moreover, specific intent may be proven by circumstantial evidence.[8]

Additionally, 18 U.S.C. § 1513 prohibits retaliation against a witness, victim, or an informant, and Pritikin had specifically promised to retaliate against Mutuc for filing a complaint against him with the ARDC. Mutuc had informed the FBI agent investigating the case about this specific threat. Mutuc had also pointed out that Pritikin was a creditor who had never gotten a ruling on the dischargeability of his debts but was successful in obtaining the $18,000 due Mutuc in the divorce and an additional $14,000 from the liquidated bankruptcy estate.

C. The perjured testimony of government star witness Mary Stravinskas meets all the definition and proof requirements of felony perjury charges prosecuted under 18 U.S.C. § 1623.

Stravinskas' testimony during her direct examination was as follows (Tr. 70, 71):

Q. Could Government Exhibit Computer

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[7]See *United States v. Baker*, supra.

[8]See *United States v. White*, 557 F.2d 233-236 (10th Cir. 1977) (per curiam).

Associates 1 reflect a different number of option and option price per option share than when the stock option was actually granted?

A. Yes, it could.

Q. Now, but does this mean that the employee ended up with more or less value in the options after the split than they had when these options were initially granted?

A. No, there would be no more or less value.

It was of course simpler to give the actual value of the stock options in 1994. She was the treasurer of Computer Associates and keeper of the stock options company portfolio. But the calculated value would be a negative value. This would kill the Government's theory that Mutuc had committed divorce fraud in concealing very valuable stock options from Pritikin during divorce settlement negotiations.

Stravinskas also testified that the grant date in the report was the date that the stock option certificates were given to the employee. This was false in two parts: there were no certificates given for the 1987 stock options and Mutuc was not even an employee of Computer Associates in 1987. Mutuc was an employee of Cullinet Corporation in 1987 and became an employee of Computer Associates in 1989 when the two companies merged. The former wife received the letter notifying Mutuc – in Kuala Lumpur, Malaysia at the time on a job assignment -

of the options awarded to him in the merger and informing him that the options were at the time worthless.

Stravinskas, as the treasurer of Computer Associates and the first person to call for employee stock option answers, knew that her information was false. It is not at all inconceivable that she had made a deal with the government, with Computer Associates in the middle of a criminal investigation on alleged financial wrongdoings including the backdating of employee stock options. She certainly did not suffer the fate of numerous Computer Associates officers like her starting with their CEO Sanjay Kumar who was sentenced to 12 years in prison and fined millions of dollars.

Utilizing Stravinskas' false testimony regarding the backdated grant date, the Government also charged Mutuc of concealing the 1996 and 1997 stock options from the bankruptcy. The Section 2255 had provided proof that this charge was blatantly false.

D. The government case, minus the non-existent divorce fraud plus the funds withheld from the creditors by Pritikin's actions, turned the entire proceedings into a travesty of justice.

The Government had suborned Stravinskas and Pritikin into committing perjury. The perjured testimonies were needed to prove the Government's theory. The AUSAs had gone to New York and the

offices of Computer Associates and done their research. Instead of a clear-cut document showing the actual value of Mutuc's stock options in the divorce, the Government went ahead with a very elaborate dog-and-pony presentation around the perjured testimonies of Stravinskas and Pritikin to deceive the jury with non-existent assets and non-existent documents.

Additionally, in order to cover all their bases, the Government advanced the lie at trial that Mutuc had only to sit and wait for the stock options to increase in value. Besides contradicting their own offered evidence that the value of the options was the same in 1994 and 1997, and ignoring the fact that the debt issue was already resolved in the divorce from marital assets existing in 1994 as required by the Marriage Dissolution Act of Illinois (the assets and funds that Pritikin had put on hold), this irresponsible statement directed to the jury violated very basic SEC rules and regulations against making forward-looking claims on future stock market values.

Minus the divorce fraud therefore, and the fact that Mutuc had already settled the debts and Pritikin's precluded fees, the evidence at trial was woefully insufficient to show beyond a reasonable doubt that Mutuc had intended to defraud the creditors. This extreme shortcoming gives rise to his Due Process claim that he was entitled to a judgment of acquittal. The Section 2255 had also pointed out that the deliberate deception of the court and jurors by the presentation of known false evidence is incompatible with "rudimentary

demands of justice" and whether it was the result of negligence or design, it was still the responsibility of the prosecutors.[9]

Here the materiality of the perjured testimonies likewise denied Mutuc the right to an impartial determination by the jury of his alleged criminal intent. Defendants have a constitutional right to trial by an impartial jury, regardless of whether the trial judge and appellate court may somehow think they are guilty. The decisions below took away that right from Mutuc.[10]

The Section 2255 also listed numerous other instances of prosecutorial misconduct that included the full investigation and interrogation of Jonscher without Mutuc's knowledge and without a waiver in violation of the attorney-client privilege. The result was a plea deal in which Jonscher got a "slap in the wrist" for the failure to declare the $18,000 in Mutuc's bankruptcy form – an offense later dropped at trial but arrogantly resurrected in the sentencing phase – and the full approval and confidence to deny any knowledge of Mutuc's financial affairs in the witness stand at trial. The prosecution of the three new charges at trial alone is a classic example of judicial abuse of process.

E. Neither the perceived strengths nor the glaring failures of defense

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[9]See *Giglio v. United States*, 405 U.S. 150, 153-154 (1972); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

[10] See *United States v. Gaudin*, 515 U.S. 506, 511 (1995).

counsel justify any of the perjured testimonies, prosecutorial misconduct, or trial court errors in the government prosecution of the case.

Argument II below centers on the affirmative defense, later the good faith defense that never materialized for Mutuc because of the ineffective assistance of defense counsels. Here the emphasis is on the fact that the government's prosecution of the case was flawed and fatal regardless of the government's finger pointing that Mutuc was duly represented by counsel. To the contrary, there is circumstantial evidence that Walsh was strung along in the re-opened bankruptcy proceedings and coerced into withdrawing as counsel in the criminal case. His retained replacement Fennerty was trapped into thinking that he could force Mutuc to accept the Government's plea bargain agreement, and then withdrew as counsel immediately after the guilty verdict.

II. ERNESTO MUTUC WAS ACTUALLY INNOCENT OF THE CRIMES OF DIVORCE AND BANKRUPTCY FRAUD PRESENTED TO THE JURY AT TRIAL.

Fennerty was hired by Mutuc to present his affirmative defense which Walsh had first indicated was the Good Faith defense. Basically the defense did not negate any of the essential elements of the crimes charged except the very first charge of intent to defraud. Mutuc provided Walsh, then Fennerty,

with voluminous divorce documents and write-ups surrounding the divorce and bankruptcy matters and the details of a multi-prong defense that would aggressively point out the failures of Jonscher and the criminal machinations of Pritikin (See Section 2255 Reply Brief, Exhibits K and L).

A. The divorce agreement and expressed intentions of the divorce court had dictated Mutuc's course of action throughout the divorce and bankruptcy proceedings.

Mutuc had a job to maintain and protect, a new family to support, and children to educate properly. He assigned all of his employee stock options through 1994 to his sister to pay for past debts and to borrow additional funds on a continuous basis. This "borrowing" consisted of actual cash, use of his sister's telephone to call the Philippines, and putting necessity purchases on his sister's credit cards. These were all conducted in a very informal family basis.

Meanwhile, litigations concerning Pritikin's attorneys fees and the un-enforced QDRO were continuing in divorce court. Pritikin had refused to modify the QDRO according to the specific instructions given to him by Computer Associates. This had put Mutuc's 401k funds on hold and not released to pay the debts. With the minor child turning 18 and graduating from high school, child support would end and Mutuc's payroll would be opened up for garnishment by creditors (See Section 2255 Reply Brief, Appendix B, Computer Associates

letter to the Clerk of the Circuit Court of Illinois regarding a wage deduction order). Pritikin was also awarded his attorneys fees despite the fact that this was precluded by the divorce agreement. Mutuc was therefore forced to file for bankruptcy as his last resort before he could go back to divorce court for relief.

> ***B. In the matter of Ruth, 31 C.B.C.2d 1050, 171 B.R.789 Bankr.E.D.Mich. 1994, the Court had held that "A Debtor may choose to avoid disclosure of information if the disclosure would harm the Debtor more than it would help the estate, but the choice should be in good faith based on a legal ground."***

This was not, however, to be a full non-disclosure. On very specific advice of counsel, all of Mutuc's assets not disclosed in the forms would be disclosed and explained to the trustee at the meeting of creditors. This was in fact done, not by Jonscher or Mutuc, but by an assistant trustee. This person who Mutuc had never met before had been briefed by either Jonscher or Pritikin beforehand and had briefed the trustee at the meeting with the further explanation that the bankruptcy was part of the Mutuc divorce settlement process. Mutuc saw no need to further supplement the assistant trustee's disclosure and explanation, especially when Mutuc had already been admonished by the divorce court for allegedly sabotaging the intention of the court in previous occasions regarding the non-release of the 401k funds.

C. The assets and funds allegedly concealed from the trustee were on hold, in litigation, and under the jurisdiction of the divorce court before, during, and after the bankruptcy and criminal prosecution of Mutuc.

In other words, the payment of the creditors from the assets and funds surrendered by Mutuc was not in Mutuc's power to perform. Except for child support, Mutuc knows of no other responsible party for implementing this provision other than the lawyers themselves. It was in Pritikin's power to implement the divorce court provisions regarding the debt or have the bankruptcy proceed to discharge as the divorce court had intended all along. The fact that he chose to pursue his personal vendetta against Mutuc instead and commit perjury at Mutuc's trial exonerates Mutuc.

D. Mutuc's defense counsel James R. Fennerty was fully cognizant of Mutuc's affirmative defense when he accepted the case and proceeded to trial.

Mutuc's Section 2255 Reply Brief to the Government Response provided very detailed attorney-client correspondence between Walsh and Mutuc initially, and between Fennerty and Mutuc later, regarding the affirmative defense. Fennerty gave no indication that he would change the defense strategy at trial, in fact telling Mutuc before the trial that he would call Pritikin as a hostile witness if the

government did not. Fennerty avowed professionalism and his knowledge of the case from the record provided him.

III. THE COURT OF APPEALS HAD COMMITTED THE ERROR OF ESSENTIALLY DECIDING AN APPEAL WITHOUT JURISDICTION.

The final order of the District Court is in Appendix C. The appeal of this final order included a Motion for Certificate of Appealability (COA) (Appendix F). The Order denying this COA was entered on October 30, 2007 (Appendix B). On November 7, 2007 Mutuc filed a COA with the Court of Appeals (Appendix E) which appended the COA filed in District Court.

The Order of the Court of Appeals (Appendix A) denied the COA and terminated the appeal without a single word about the denial of the Section 2255 and COA by the District Court, and without an explicit affirmation of the District Court's procedural default rulings. The Court may not however treat a COA as an invitation to immediately pass upon the merits without first granting the certificate. Mutuc was not required to show a likelihood of success on the merits; it is enough that reasonable jurists would find that the claim warrant closer examination.[11] The threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a Court of Appeals sidesteps this process, in

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[11]See *Miller-el v. Cockrell*, 537 U.S. 322, 338 (2003).

Mutuc's case denying the COA after a finding that there was no substantial showing of a denial of a constitutional right, it is in essence deciding an appeal without jurisdiction.[12]

Mutuc was deprived of liberty and property without due process of law. He was wrongfully convicted by a blindfolded jury. He keeps his respect for the law and the judicial system, having been brought up around the law and politics most of his early life in the Philippines where his father, a USAFFE veteran, was a successful lawyer, businessman, and head of the Nacionalista Party in Manila, the party of Ferdinand Marcos before martial law. A distant cousin of his father was the Philippine ambassador to the United States when John F. Kennedy was president. Mutuc is compelled to fight the abuses of lawyers and judges who are more interested in keeping a closed eye to the actions of the officers of the courts than in upholding the Constitution and the basic rights of ordinary citizens.

A. The Court erred first in dismissing the appeal, and then in issuing an order without any reason, explanation, or opinion for its decision.

The Court understood exactly that "The present case presents for our review the denial of a post-conviction motion under 28 U.S.C. § 2255." The Government's had also stated that Appellant (Mutuc) "has not previously brought a post-

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[12] See *Slack v. McDaniel*, 529 U.S. 386-67 (2000).

conviction motion under 28 U.S.C. § 2255 challenging the same judgment that the appellant now challenges."

A party has a due process right to a decision that explains the reasons for the decision. The decision must contain enough information to show the reasoning process for the result reached from the evidence and arguments presented, and to allow a reviewing court to understand the basis for the decision. In very simple cases less explanation is required; in more complex ones a detailed explanation is necessary.[13]

A wrongful conviction is, by its very nature and due process implications to the adjudged guilty party, a complex case requiring more detailed explanations. The party also has a right to an opinion that is consistent with past court opinions in similar matters, or reasons for departing from precedent. An opinion that is inexplicably contrary to other past court decisions reached on similar facts is a due process violation.

The prosecution of Mutuc was a mockery of due process of law and the right to a fair trial. The case was not rational and fair.[14]

B. Mutuc and his family continue to suffer the consequences of the wrongful

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[13]See *Koelbl v. Whalen*, 63 AD.2d 408 (3rd Dept. 1978).

[14]See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

conviction while the true perpetrators of the crimes are on the loose.

The only true resolution to a wrongful conviction is a direct reversal. As for the true perpetrators of the crimes, Mutuc had pointed out that even now Pritikin prominently advertise himself as a hearing officer for the ARDC. While this may be good for his clients and business, it is not in the interest of justice and could be prejudicial to the clients of his opposing counsels, especially when major custodial and property issues are involved.

Also, no fair-minded lawyer would lodge a complaint directly with the ARDC against an opposing counsel in the middle of their litigation proceedings. But Pritikin did against Jonscher and even then Mutuc's rights were already compromised. And win or lose, Mutuc's legal matters were the bread and butter of a law practice and there was no logical explanation for Jonscher selling out Mutuc in the divorce and withdrawing as counsel in the bankruptcy, for Walsh abandoning Mutuc in the criminal case after feeding him to the wolves in the bankruptcy, and for Fennerty taking a dive at trial and immediately withdrawing as counsel before sentencing. They were all intimidated by Pritikin, an ARDC hearing officer for claims against attorneys, and by the specter of the ARDC.

Finally, in this age of the internet and Google, the issue of reputational injury truly becomes an issue of a continuous deprivation of liberty. Mutuc had lost his job as a direct result of his conviction. There was no chance he could have returned as a

banking software consultant to his former clients such as Chase, ABN Amro, and CitiBank after serving his sentence. The issue even cascades to his progeny in ways that cannot yet be measured but almost always impossible to prevent.

IV. THE DISTRICT COURT ERRED IN ITS OPINION DENYING THE CONSTITUTIONAL ISSUES AS PROCEDURALLY DEFAULTED.

The Section 2255 was not an appeal of the Court of Appeals decision on direct appeal. The Section 2255 was a new appeal that recast the government case and prosecution into its true and proper perspective. According to Mutuc's appellate counsel Brent D. Burley, he had argued matters of law and not matters of fact as appropriate in a direct appeal. Unfortunately the Court of Appeals, in prejudging Mutuc's intent to defraud, had immediately accepted the perjured testimonies of Stravinskas and Pritikin as "relevant and not overly prejudicial." See Argument V below.

In spite of the facts re-stated in the Section 2255, the District Court chose to merely copy (in fact lifted) the BACKGROUND section of the Court of Appeals decision on direct appeal (Compare Appendices C and D). This time the District Court not only ignored Mutuc's version. It also ignored the Constitutional violations committed by the officers of the courts in the persons of its witnesses, prosecutors, and defense counsels. This was done very conveniently by dismissing the issues as procedurally defaulted.

A. It is a fatal error of logic to ignore the issue of a miscarriage of justice in order to advance a procedural default finding that the specific arguments in support of the fifth and sixth amendment violation issues were not raised on direct appeal.

The District Court cites *Oliver v. United States*, 961 F.2d 1339, 1341 (7th Circ. 1995) in laying the legal standard under which a 28 U.S.C. Section 2255 can challenge a sentence or conviction if it is based on an error that is "jurisdictional, constitutional, or is a fundamental defect which inherently results in a complete miscarriage of justice," (See Appendix C, page 4). Mutuc had raised the Constitutional issues of the violation of his Fifth and Sixth Amendment rights that resulted in a complete miscarriage of justice. The District Court then ruled that Mutuc's first issue is barred because it was not raised on direct appeal, and the second issue barred because he did not argue that his right to a jury trial was violated in sentencing. Logic and the Legal Standard demand that the Constitution and Mutuc's due process rights alone take precedence over the disputed issue of whether Mutuc did or did not make the claims on direct appeal. The Court cannot construct their own premise and rule upon it without first addressing Mutuc's premise and arguments. But perhaps the Court had ruled on the merits but cannot support its decision. Mutuc's appellate counsel did make very serious Constitutional violation claims that called for a reversal. Mutuc then brought up arguments

regarding false testimonies that the Court of Appeals had completely missed, or simply ignored.

Furthermore, Mutuc submits that the wrongful conviction and sentence, and the loss of livelihood, present and future income, assets, and freedom are extraordinary situations as much as the extraordinary situation cited in *Prewitt v. United States*, 83 F.3d 812,816 (7th Circ. 1996).

B. It is also a fatal error of logic to omit the totality of perjured testimony, obstruction of justice, prosecutorial misconduct, trial court error, and defense counsel failure claims in order to deny the ineffective assistance of counsel issue as procedurally barred because of an absence of changed circumstances of fact.

The Section 2255 is very specific in pointing out this totality. Mutuc had also cited *United States v. Guglielmini*, 384 F.2d 602 (2nd Cir. 1967) on cumulative conduct and errors of the court and prosecutors. The Government was silent on the conduct and errors listed. The best it could do was offer a sanitized version of their case, arguing that Mutuc was still guilty even if the claim of perjured testimonies was true. Even this position was not substantiated. These are all "changed circumstances of fact" subsequent to trial.

The jury could not have convicted Mutuc with this totality were it exposed at trial.

C. The District Court erred in denying the Certificate of Appealability when Mutuc had a valid claim of the denial of his constitutional rights of due process, competent counsel, and a fair jury trial.

The Section 2255 had attacked the entire Government case as constitutional flawed that had led directly to Mutuc's wrongful conviction. This was a constitutional claim that any reasonable jurist would find fundamentally wrong, and well beyond the relatively particular issues and legal technicalities in the cases cited by the trial court such as in *Slack v. McDaniel*, 529 U.S. 473, 484, 146 L. Ed. 2d 542, 120 S.Ct. 1595 (2000).

The COA (Appendix F) had also thoroughly rebutted the Memorandum Opinion and Order (Appendix C). The District Court denied the COA nevertheless on the same argument that there was no direct concordance on the specific arguments raised in the Section 2255 and the direct appeal. The District Court then concluded that "because the court's finding of procedural default is correct and not debatable based on the record, Petitioner's motion for COA on the procedurally defaulted claims are denied." (See Appendix B). But the record was already closed to the jurists by the ruling.

V. THE COURT OF APPEALS ERRED IN ITS DECISION IN THE DIRECT APPEAL AFFIRMING THE PERJURED *CASE* OF DIVORCE FRAUD WITHOUT REVIEWING DE

NOVO THE FACTS OF THE CASE.

The decision on appeal centered on the conclusion that: "It is self-evident that one with an intent to defraud does not act in good faith." (Appendix D, page 5). This followed the finding that Fennerty's examination of Jonscher did not fall below the standard of reasonableness as set out in *Strickland. Strickland v. Washington, 466* U.S. 668, 688 (1984). It also followed the dismissal of Fennerty's failure to obtain the "good faith" jury instruction citing *United States v. Given,* 164 F.3d 389, 394 (7th Cir. 1999). The conclusion was further justified with the finding that Fennerty's filing of In Limine Motions would have been fruitless anyway and does not meet the prejudice prong of *Strickland.* The decision in fact states that:

> "It is clear that, if required, the two witnesses would have been qualified as experts in their fields under Federal Rule of Evidence 702. The first witness merely explained a business record generated by her department at the defendant's place of employment. The second witness, Pritikin, an experienced divorce attorney, essentially explained the nuances of divorce proceedings. The complained-of evidence was relevant and not overly prejudicial. Therefore, filing a motion to exclude such expert testimony would have been fruitless." (Appendix D, page 6).

In light of the fact that the complained-of evidence was regarding the perjured testimonies of a

non-existent divorce fraud, the conclusion of the Court of Appeals is merely a repetition of the constitutionally flawed Government case. And the fact that the Court had concluded that Fennerty was partly "successful" only underlines the fact that Fennerty had completely failed. And the failure was so remarkable as to constitute a "dive". The Court's comment that "mutual admiration societies are not constitutional guarantees" only shows the fact that the Court had not taken into account "the role ... James Pritikin played in driving appellant toward financial disaster. These pressures, coupled with an incompetent bankruptcy attorney and an asleep at the switch defense lawyer in the criminal trial, have, simply put, resulted in a miscarriage of justice and landed a model citizen behind bars." (Appellant Brief, page 14).

As a part of this justification the Court states:

> "In an attempt to show ineffective assistance of counsel, Mutuc points to Jonscher's representation during the bankruptcy proceedings. Jonscher was not Mutuc's attorney for the criminal proceedings and there is no constitutional right to a competent attorney in civil proceedings." (Appendix D, page 4).

It was however the divorce matters that figured greatly in the prosecution of Mutuc. In fact in *Liss v. United States*, 915 F.2d 287, 291 (7th Cir. 190) the good faith defense rests in part on "[the defendant] in good faith sought the advice of an attorney whom he considered competent". It does not say that this

attorney must be the counsel in the criminal case.

A. *The Court of Appeals had committed the classic error of pre-judgment.*

The Court of Appeals had the necessary evidence and trial records to review de novo the witnesses' testimonies and find them to be untrue, or at least state that they were not false with the rationale for their finding.

In the Court's comment that "Assuming arguendo that Jonscher told Mutuc to lie under oath, this advice cannot support a defense to perjury", the Court completely omits the fact that Jonscher's had not advised Mutuc to lie but that all the assets and funds in divorce court litigation and jurisdiction would be declared and discussed in the meeting of creditors, not in the bankruptcy forms.

The Court had also stated that "Mutuc admitted to being the true owner of the real property" during the Rule 2004 examination when in fact Mutuc had only explained that he was only the legal and not the equitable owner because all the funds used to purchase the property had already been assigned to a third party three years before the bankruptcy. This was Mutuc's position in divorce court litigations, the position declared in the Rule 2004, and the position maintained in the criminal trial.

B. The Court of Appeals erred in its understanding of Mutuc's rights under the divorce settlement agreement.

either the bankruptcy or the criminal proceedings. She had in fact told Pritikin not to pursue the matter of the stock options that were worthless at the time of the divorce and not concealed. And the red flags were there on the lawyers' actions, not Mutuc's.

C. The Court of Appeals erred in its finding that Mutuc was not entitled to any of the "proposed" good faith jury instructions.

The issue here is the Trial Court's refusal to grant the good faith instruction, not the failure of Fennerty to obtain the instruction. Mutuc had taken issue with the failure to give a good-faith reliance on advice-of-counsel instruction. Defense Exhibit 1, also Appendix C in the Appellant Brief, shows that Mutuc had fully disclosed all material facts beforehand to Jonscher – and to Pritikin in divorce proceedings – regarding the issues and charges made by the prosecution at trial. He relied in good faith on the advice of counsel throughout the divorce and bankruptcy.[15] Any foundation in the evidence as to reliance on advice of counsel is sufficient to merit a jury instruction on a reliance theory.[16]

The justification given for the conclusion that Mutuc was not entitled to this instruction is this: "It is impossible to intend to deceive while

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[15]See *United States v. Johnson*, 730 F.2d 683, 686 (11th Cir. 1984).

[16] See *United States v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994).

simultaneously acting in good faith." (Appendix D, page 9). This was further complicated by the finding that "the gist of the proposed instruction was already part of the charge." (Appendix D, page 9). A careful reading of the jury instructions (Tr. 858-873; and specifically 864-869) however shows that there is nothing remotely close to any kind of a good faith instruction, or even one that can be inferred by a layperson as a defense instruction. Clearly Mutuc had relied on Jonscher's divorce and bankruptcy advice, and indirectly on Pritikin to stop the bankruptcy by paying the debts from the funds and assets already surrendered by Mutuc if the filing would truly constitute bankruptcy fraud. Anything else would have been a direct assault on the well-being and welfare of Mutuc's family.

Moreover, when explaining the need for unanimity on specific acts (Tr. 864), the Trial Court had used the same example from the indictment effectively suggesting to the jury that Mutuc was guilty of Count 2 of the indictment. And reciting the jury instructions on DATE OF CRIME CHARGED was unnecessary. It was also prejudicial in Mutuc's case where the Government was already deceiving the jury as to the value of assets at the time of the divorce and at the time of the bankruptcy.

D. The Court of Appeals erred in its finding that the "intended loss" enhancement argument is unpersuasive.

After ignoring Mutuc's version, the Court concluded that: "While Mutuc may have intended

that his creditors be paid, his overall intent was that he would not be the one to pay." (Appendix D, page 12). This was not however Mutuc's position. He had already paid the debts. With child support ending, his income would be garnished making it impossible for him to support his family and properly educate his children. (See Government Exhibit Bankruptcy File 1, Schedule I - Income and Schedule J - Expenditures).

E. The Court of Appeals erred in waiving the issue of adjustment for perjury enhancement because Mutuc did not object at sentencing.

After contrasting "our system" with the "civilized way of approaching" a defendant's testimony in Egypt and waffling about the perjury enhancement, the Trial Court "awarded" it with no factual determination other than its own statement that "It is obvious that Mr. Mutuc did not tell the truth." (Sentencing Tr. 33-35). But this still begs the question: was Mutuc wrong and did the false testimony really amount to perjury? And wasn't this the proper purview of the jury at trial?

Furthermore, Mutuc did object to the lack of specific findings "on substantive and procedural grounds" only because there was no specific finding to object to.

Therefore, Mutuc respectfully requests the Court or any individual Justice to issue him a certificate of Appealability to enable him to take his meritorious appeal of the denial of his Section 2255

motion. Further, that the Court provide any and all other relief it deems just and proper according to law, in the interest of justice, and to protect the fairness, integrity, or public reputation of the proceedings, and to exercise its supervisory power over the administration of justice.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

_____

Ernesto Mutuc **Pro Se**
1900 Wilmette Ave #4B
Wilmette, IL 60091
(847) 251-1038

VERIFICATION: I declare under penalty of perjury that the foregoing is true and correct.Ernesto Mutuc

_____ Notary _____

Subscribed and sworn to before me in _____, Illinois on this _____ day of March, 2008 affiant exhibiting to me his Illinois Driver's License Number M320-2074-1252 expiring on 09-04-11.

_____

(Signature of Notary, title)

APPENDIX A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 14, 2007
Decided January 11, 2008

Before

Hon. DIANE P. WOOD, Circuit Judge

Hon. TERENCE T. EVANS, Circuit Judge

No. 07-3656

ERNESTO G. MUTUC,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the northern District of Illinois, Eastern Division

No. 04 C 6034

David H. Coar, *Judge.*

O R D E R

Ernesto Mutuc has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ERNESTO MUTUC,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

HONORABLE DAVID H. COAR
NO. 04 C 6034

STATEMENT

District courts may issue a Certificate of Appealability ("COA") "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has denied a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529

U.S. 473, 484, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000). When a district court has denied a petitioner's claims on procedural grounds "without reaching the petitioner's underlying constitutional claim," a COA should issue if reasonable jurists could debate whether the petition states a valid claim of the denial of a constitutional right and whether the district court erred in its procedural ruling. *Id.* at 478.

The petitioner need not demonstrate that he will prevail in order to receive a COA. See *Miller-El v. Cockrell,* 537 U.S. 322, 154 L. Ed. 2d. 931, 123 S. Ct. 1029 (2003). However, the petitioner requesting a COA "must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." See *Miller-El,* 537 U.S. at 338. "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* (quoting *Williams v. Taylor,* 529 U.S. 362, 399, 146 L. Ed. 2d. 389, 120 S. Ct. 1495 (2000)).

In the present case, Petitioner moves this court to issue a COA on the finding that two of his claims were procedurally defaulted because they were not raised on direct appeal. The claims are: (1) the government used perjured testimony and introduced new charges at trial, violating his Fifth and Sixth Amendment rights; (2) the trial court violated his Sixth Amendment right to a jury trial by increasing his sentence for loss amount and obstruction of justice. In his direct appeal, Petitioner raised the following claims: (1) ineffective assistance of counsel, (2) failure to properly instruct the jury,

and (3) an erroneous sentence calculation. Petitioner now claims that his statement that "attorney, James Pritikin, played [a role] in driving Appellant (Petitioner) toward financial disaster," and that "these pressures, coupled with an incompetent bankruptcy attorney and an asleep at the switch defense lawyer in the criminal trial, have, simply put, resulted in a miscarriage of justice and landed a model citizen behind bars" raised, on direct appeal, the claim that perjured testimony violated Petitioner's Fifth and Sixth Amendment rights. Although Petitioner may have mentioned perjury or the incompetence of his lawyers, he did not raise the specific issue of perjury before the Seventh Circuit Court of Appeals for review. Neither did Petitioner raise the issue that the trial court violated his Sixth Amendment right to a jury trial by increasing his sentence for loss amount and obstruction of justice on direct appeal. No reasonable jurists could find that these claims were raised on direct appeal., when the only claim raised before the Seventh Circuit on direct appeal were ineffective assistance of counsel, failure to properly instruct the jury, and an erroneous sentence calculation. Because the court's finding of procedural default is correct and not debatable based on the record, Petitioner's motion for COA on the procedurally defaulted claims are denied.

Petitioner also moves this court to issue a COA on the issue that the ineffective assistance of counsel claim was procedurally defaulted because it was already advanced and reviewed on direct appeal. Petitioner cites to *Massaro v. United States*, 538 U.S. 500 (U.S. 2003) in arguing that ineffective assistance

of counsel claims may be brought in a collateral proceeding under 28 U.S.C. Section 2255, whether or not a defendant could have raised the claim on direct appeal. *Massaro* is inapposite to the present case. In *Massaro,* the petitioner did not raise the claim on direct appeal, and the Supreme Court found that this failure to raise the issue on direct appeal did not bar an ineffective assistance of counsel claim under 28 U.S.C. Section 2255, regardless of whether or not the petitioner could have raised it on direct appeal. In the present case, Petitioner did not fail to raise the claim, but did in fact raise the claim before the Seventh Circuit, where the claim was reviewed. Under these circumstances, the Seventh Circuit has held that "in the absence of changed circumstances of fact or law, [courts] will not reconsider an issue which was already decided on direct appeal." *Olmstead v. United States,* 55 F.3d 316 (7th Cir. 1995). Thus, the Seventh Circuit will not re-review Petitioner's same claim of ineffective assistance of counsel. Accordingly, no reasonable jurist could debate that the Petitioner's ineffective assistance of counsel claim was procedurally defaulted because it was already raised on direct appeal and reviewed by the Seventh Circuit. For the foregoing reasons, Petitioner's motion for certificate of appealability is denied.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ERNESTO MUTUC,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

HONORABLE DAVID H. COAR
NO. 04 C 6034

MEMORANDUM OPINION AND ORDER

Petitioner Ernesto Mutuc's motion to vacate his sentence pursuant to 28 U.S.C. § 2255 is before this Court. For the following reasons, the motion is DENIED.

I. FACTS

In 1994, Mutuc's marriage ended in divorce. Under the divorce decree, Mutuc's former wife, Julie

Kanealy, received alimony, child support, the marital domicile, and the funds within Mutuc's 401(k). The 401(k) funds, approximately $36,000 as of May 2, 1994, were to be used in paying the marital debts. Kanealy failed to pay the creditors.

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Mutuc, through Jonscher, filed a Chapter 7 bankruptcy petition in the Northern District of Illinois on April 4, 1998. Mutuc stated that his total secured debt amounted to $51,427, his monthly income was $1,560.28, and his monthly expenses were $3,463.70. More importantly, Mutuc claimed that he owned no real estate, had a limited number of stock options from his former employer, and had a checking account with Mid-Town Bank with a balance of zero. He also claimed his money market account at Northern Trust was closed in November of 1997 when he gave the final balance of $15,914.43 to his sister.

Essentially, Mutuc claimed that he had no assets or money to satisfy debts that equaled approximately $80,000. The bankruptcy court granted Mutuc a discharge of his debts. It later became apparent that much of this information was false.

Mutuc's stated reason for filing for bankruptcy was to force his ex-wife to pay the marital debts. In doing so, he badly misrepresented his net worth. The facts show, among other things, that Mutuc concealed various bank accounts and stock options, that he concealed his ownership of real property and failed to disclose the transaction in which he obtained property, and that he misrepresented his gross income. Many of these false statements were made in documents filed in the bankruptcy court and others given orally while under oath.

At some point during an August 27, 1998 deposition regarding the dischargeability of Pritikin's attorney's fees, Mutuc admitted to being the true owner of the real property mentioned above. Pritikin then informed the office of the United States Attorney that Mutuc had committed bankruptcy fraud.

The government charged Mutuc with one count of filing a bankruptcy petition in furtherance of a scheme to defraud, 18 U.S.C. § 157; two counts of making false statements, under penalty of perjury, 18 U.S.C. § 152(3); and one count of making a false oath or account in a bankruptcy case, 18 U.S.C. § 152(2). After a six day jury trial, Mutuc was found guilty as charged and sentenced to twenty three months' imprisonment, three years' supervised release, and fined $4,000. Mutuc filed an appeal with the Seventh Circuit, arguing (1) ineffective assistance of counsel, (2) failure to properly instruct the jury, and (3) an erroneous sentence calculation. On November 21, 2003, the Seventh Circuit affirmed

Mutuc's conviction and sentence. Mutuc then filed the instant Section 2255 petition with this court.

In his Section 2255 petition, Mutuc alleges three grounds for relief: (1) the government used perjured testimony and introduced new charges at trial, violating his Fifth and Sixth Amendment rights; (2) the trial court violated his Sixth Amendment right to a jury trial by increasing his sentence for loss amount and obstruction of justice; and (3) ineffective assistance of counsel.

II. LEGAL STANDARD

Under 28 U.S.C. § 2255, federal prisoners can challenge the imposition or length of their detention if their conviction or their sentence is based on an error that is "jurisdictional, constitutional, or is a fundamental defect which inherently results in a complete miscarriage of justice." *Oliver v. United States,* 961 F.2d 1339, 1341 (7th Cir. 1995) (internal quotations and citations omitted). If the reviewing court determines that any such defect exists in the judgment or sentence, it "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255.

In addition, after reviewing the Petitioner's motion, the government's response, and any record of prior court proceedings, the court will determine whether an evidentiary hearing is required. *See* Rule 8(a) of the Rules Governing Section 2255 Proceedings. "If it plainly appears from the face of

the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the [court] shall make an order of summary dismissal." *See* Rule 4(b) of the Rules Governing Section 2255 Proceedings; *see also Liss v. United States*, 915 F.2d 287, 290 (7th Cir. 1990).

Habeas corpus relief is reserved for extraordinary situations. *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996).

III. ANALYSIS

Under the procedural default doctrine, claims not raised on direct appeal are barred from collateral review unless a failure to consider the issue would amount to a fundamental miscarriage of justice. *Fountain v. U.S.*, 211 F.3d 429 (2000). That is, "constitutional claims may be raised for the first time in a collateral attack, if the defendant can demonstrate cause for the procedural default as well as actual prejudice from the failure to appeal." *Barker v. U.S.*, 7 F.3d 629 (1993). In the present case, Mutuc did not raise on direct appeal the claims that (1) the government used perjured testimony and introduced new charges at trial, violating his Fifth and Sixth Amendment rights; (2) the trial court violated his Sixth Amendment right to a jury trial by increasing his sentence for loss amount and obstruction of justice. Mutuc argued on appeal that his sentence calculation was in error, but did not argue that his right to a jury trial was violated in sentencing. Mutuc does not demonstrate either good cause or actual prejudice from his failure to raise the above claims on direct appeal. In his Reply Brief,

Mutuc seems to argue that there was allegedly falsified information provided in trial, and asserts that this gave cause and prejudice for the failure to raise the above two claims on appeal. Asserting that there was false information presented at trial does not explain why Mutuc did not bring this to the attention of the courts on appeal, and demonstrate neither cause nor prejudice. Thus, claims (1) and (2), as stated above, are procedurally defaulted.

The Government further contends that the ineffective assistance of counsel claim is procedurally defaulted because it was already advanced and reviewed on direct appeal. The Seventh Circuit has held that "in the absence of changed circumstances of fact or law, [courts] will not reconsider an issue which was already decided on direct appeal." *Olmstead v. United States,* 55 F.3d 316 (7th Cir. 1995). The ineffective assistance of counsel claim has already been brought before the Seventh Circuit, where it was argued that Mutuc's trial attorney was ineffective because, *inter alia,* he was deficient in cross examination of Government witnesses, he failed to file motions in Limine and object to certain evidence, and he had a poor relationship with Mutuc. Mutuc brings these claims again in the instant 2255 petition, and absent a change in law or fact, these claims are barred.

Mutuc also argues that defense failed to call certain witnesses, rendering ineffective assistance of counsel. Decision as to whether to call certain witnesses or ask particular questions are tactical matters, not subject to review. *United States v. Williams,* 106 F.3d 1362, 1367 (7th Cir. 1997). A lawyer's decision to call or not to call a witness,

without more, is a strategic decision, and does not rise to the level of a Six Amendment violation. *Id.* This court does not find that trial counsel's performance fell below an objective standard of reasonableness in its defense of Mutuc; Mutuc's 2255 petition of ineffective assistance of counsel is denied.

IV. CONCLUSION

For the foregoing reasons, Mutuc's Motion to Vacate Pursuant to 28 U.S.C. 2255 is DENIED. This case is closed.

Enter:

/s/ David H. Coar

David H. Coar

United States District Judge

Dated: **September 26, 2007**

APPENDIX D

United States Court of Appeals

For the Seventh Circuit

No. 03-1116

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ERNESTO MUTUC,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 01 CR 405 – **David H. Coar,** *Judge.*

ARGUED SEPTEMBER 19, 2003 – NOVEMBER 21, 2003

Before BAUER, RIPPLE, WILLIAMS, *Circuit Judges.*

BAUER, *Circuit Judge.* Defendant-Appellant Ernesto Mutuc appeals his conviction and resulting sentence for having committed bankruptcy fraud. He argues ineffective assistance of counsel, failure to properly instruct the jury, and an erroneous sentence calculation. We affirm Mutuc's conviction and sentence.

I. BACKGROUND

In 1994, Mutuc's marriage ended in divorce. Under the divorce decree, Mutuc's former wife, Julie Kanealy, received alimony, child support, the marital domicile, and the funds within Mutuc's 401(k). The 401(k) funds, approximately $36,000 as of May 2, 1994, were to be used in paying the marital debts. Kanealy failed to pay the creditors.

The divorce proceedings also provided for reciprocal releases and indemnity agreements for the spousal debts occurring after October 1, 1992. Nevertheless, in 1998 James B. Pritikin, Kanealy's divorce attorney, obtained a judgment for attorney's fees against Mutuc for $9,812.50. Shortly thereafter, Mutuc filed for bankruptcy, represented by attorney George Jonscher.

Mutuc, through Jonscher, filed a Chapter 7 bankruptcy petition in the Northern District of Illinois on April 4, 1998. Mutuc stated that his total secured debt amounted to $51,427, his monthly income was $1,560.28, and his monthly expenses were $3,463.70. More importantly, Mutuc claimed that he owned no real estate, had a limited number of stock options from his former employer, and had a

checking account with Mid-Town Bank with a balance of zero. He also claimed his money market account at Northern Trust was closed in November of 1997 when he gave the final balance of $15,914.43 to his sister.

Essentially, Mutuc claimed that he had no assets or money to satisfy debts that equaled approximately $80,000. The bankruptcy court granted Mutuc a discharge of his debts. It later became apparent that much of this information was false.

Mutuc's stated reason for filing for bankruptcy was to force his ex-wife to pay the marital debts. In doing so, he badly misrepresented his net worth. The facts show, among other things, that Mutuc concealed various bank accounts and stock options, that he concealed his ownership of real property and failed to disclose the transaction in which he obtained property, and that he misrepresented his gross income. Many of these false statements were made in documents filed in the bankruptcy court and others given orally while under oath.

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The government charged Mutuc with one count of filing a bankruptcy petition in furtherance

of a scheme to defraud, 18 U.S.C. § 157; two counts of making false statements, under penalty of perjury, 18 U.S.C. § 152(3); and one count of making a false oath or account in a bankruptcy case, 18 U.S.C. § 152(2). After a six day jury trial, Mutuc was found guilty as charged and sentenced to twenty three months' imprisonment, three years' supervised release, and fined $4,000. This appeal followed.

II. DISCUSSION

A. Ineffective Assistance of Counsel

Mutuc takes issue with the representation he received during the divorce proceedings and bankruptcy proceedings, by attorney Jonscher, and the criminal trial, by attorney James Fennerty.

In an attempt to show ineffective assistance of counsel, Mutuc points to Jonscher's representation during the bankruptcy proceedings. Jonscher was not Mutuc's attorney for the criminal proceedings and there is no constitutional right to a competent attorney in civil proceedings.

Mutuc also argues that Fennerty, his trial counsel, was ineffective; that Fennerty's weak grasp of bankruptcy law made him incompetent to deal with the issues in the criminal case. Specifically, he points to Fennerty's examination of Jonscher, his failure to secure a particular jury instruction, his poor relationship with Mutuc, and his failure to file motions *in limine* or to object to certain evidence introduced by the government as demonstrations of incompetency.

Mutuc claims that Fennerty's examination of Jonscher was "lacking" and that he was incompetent to deal with the various bankruptcy issues involved in the criminal case. On the contrary, Fennerty's examination elicited responses that tended to show that Jonscher either was intimately familiar, or should have been intimately familiar, with Mutuc's assets. He brought out the fact that Jonscher was not a regular bankruptcy attorney and that he filed only a few bankruptcy cases a year. He brought out that Jonscher was aware of certain assets in which Mutuc had an interest that were not mentioned in the bankruptcy proceedings. Finally, he noted that Jonscher was receiving only a small fee for his work related to the bankruptcy proceedings. In short, Fennerty's examination of Jonscher supported the defense's theory of the case. The examination arguably centered on showing Jonscher's failure to properly guide Mutuc, a reasonable trial strategy when taken as support for Mutuc's argument that he relied on the advice of Jonscher when filing for bankruptcy. The examination did not fall below the objective standard of reasonableness as set out in *Strickland. Strickland v. Washington,* 466 U.S. 668, 688 (1984).

As for Fennerty's failure to obtain the "good faith" jury instruction, a defendant "is not entitled to a specific good faith instruction ... so long as, considering the instructions as a whole, the jury was adequately instructed upon his theory of defense." *United States v. Given,* 164 F.3d 389, 394 (7th Cir. 1999). Here, the jury had to find that Mutuc had an intent to defraud. It is self-evident that one with an

intent to defraud does not act in good faith.

The irreconcilable differences between Mutuc and Fennerty do not support a finding of ineffective assistance of counsel. The Sixth Amendment does not guarantee a friendly and happy attorney-client relationship. *Morris v. Slappy*, 461 U.S. 1, 14 (1983). The fact that Fennerty and Mutuc did not get along does not translate into an inability of Fennerty to zealously defend his client; it does not mean that "the objectives of representation could not be fulfilled." (Br. Of Def.-Appellant at 25). Mutual admiration societies are not constitutional guarantees and conclusory statements that Fennerty "took a dive" shows antagonism toward the lawyer but, without more, does not show antagonism from the lawyer toward the client.

Mutuc also points to his trial counsel's failure to file motions *in limine* in order to bar the introduction of what he claims was expert testimony as further examples of ineffective assistance of trial counsel. Assuming *arguendo* that the evidence was expert testimony, the claim still fails to meet the prejudice prong of *Strickland*.

It is clear that, if required, the two witnesses would have been qualified as experts in their fields under Federal Rule of Evidence 702. The first witness merely explained a business record generated by her department at the defendant's former place of employment. The second witness, Pritikin, an experienced divorce attorney, essentially explained the nuances of divorce proceedings. The complained-of-evidence was relevant and not overly

prejudicial. Therefore, filing a motion to exclude such expert testimony would have been fruitless.

Moreover, the Tenth Circuit has said "[c]onsidering that a motion *in limine* is sought to aid counsel in formulating his trial strategy, the decision regarding whether to file such a motion is clearly part of the process of establishing trial strategy." *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995). Because there is a strong presumption that strategy decisions are sound and Mutuc offers nothing to overcome this presumption, his argument fails the performance prong of *Strickland* as well. *Strickland*, 466 U.S. at 690.

Finally, Mutuc argues that trial counsel should have objected to witness Pritikin's testimony regarding divorce fraud. The simple fact is that he did object and the objection was sustained.

In summary, none of the arguments forwarded by Mutuc warrant any remedy. As explained in detail by the above discussion, the defendant's right to effective assistance of counsel was not violated.

B. Failure to Properly Instruct The Jury

Mutuc claims that the trial court erred by refusing to instruct the jury on "good faith." As the government correctly asserts, it is unclear whether the defendant takes issue with a failure to give: 1) the tendered instruction, 2) the *Cheek* instruction[1],

[1] An instruction dealing with tax cases where willfulness is at issue. *United States v. Cheek*, 3 F.3d 1057, 1063 (7th Cir. 1993).

or 3) a good-faith reliance on advice-of-counsel instruction. Nevertheless, defendant was not entitled to any of them.

A district court's refusal to give a tendered theory of defense jury instruction is reviewed de novo. *United States v. Irorere,* 228 F.3d 816, 825 (7th Cir. 2000). Where there is no objection raised to a refusal to give a particular instruction we review for plain error only. *Id.* Where an instruction has not been tendered, we likewise review for plain error.

A defendant is entitled to have the jury consider any theory of defense supported by law and evidence. *United States v. Kelley,* 864 F.2d 569, 572 (7th Cir. 1989). However, this does not mean that a defendant is entitled to any particular jury instruction. To be entitled to a particular theory of defense instruction, the defendant must show the following: 1) the instruction is a correct statement of the law, 2) the evidence in the case supports the theory of defense, 3) that theory is not already part of the charge, and 4) a failure to provide the instruction would deny a fair trial. *United States v. Chavin,* 316 F.3d 666, 670 (7th Cir. 2002).

The only instruction which was formally tendered to the court was entitled, "Good Faith" and comes from the Federal Criminal Jury Instructions of the Seventh Circuit section 6.10. Mutuc's submitted instruction reads as follows:

> Good faith on the part of the defendant is inconsistent with intent to defraud, an element of Count 1 of the indictment. The

> burden is not on the defendant to prove his good faith; rather, the government must prove beyond a reasonable doubt that the defendant acted with intent to defraud.

(R. on Appeal at 43.)

The district court refused to give the instruction to the jury, noting that good faith was a "straw man." The judge continued:

> You erect the straw man good faith and then you say, "The burden is not on us to prove the straw man." The burden is on the government-I will instruct the jury that the burden is on the government to show intent to defraud.

(Tr. 671.)

Clearly, the district court believed, as do we, that the gist of the proposed instruction was already part of the charge.

The instructions that were ultimately given to the jury uniformly required the jury to find that the defendant committed the relevant acts "knowingly" and "fraudulently." (Tr. 866-68). The instructions defined "fraudulently" as an act "done with intent to deceive . . . ." (Tr. 869.) Both common sense and common law require us to find that "an action taken in good faith is on the other side of an action taken knowingly." *United States v. Koster*, 163 F.3d 1008, 1012 (7th Cir. 1998). In other words, it is impossible to intend to deceive while simultaneously acting in

good faith.

Mutuc also argues that he was entitled to the *Cheek* instruction, found at section 6.11 of the Federal Criminal Jury Instructions of the Seventh Circuit. This instruction was never formally tendered and is inappropriate for bankruptcy fraud cases. It clearly does not apply to Mutuc's case.

Mutuc seeks a new trial because the jury was not given a good-faith reliance on counsel instruction. He characterizes the instruction as one which "charges the jury that a defendant may be found not guilty if the jury believes that [the defendant] acted in good faith reliance on the advice of his attorney." (Br. of Def.-Appellant at 26.) It is clear that the requested transaction, which was never tendered to the court, was inappropriate. Assuming *arguendo* that Jonscher told Mutuc to lie under oath, this advice cannot support a defense to perjury. The instructions tendered to the jury treated the issues fairly and accurately and they will not be disturbed on appeal. *United States v. Cheek,* 3 F.3d 1057, 1064 (7th Cir. 1993), (citing *United States v. Thibodeaux,* 758 F.2d 199, 202 (7th Cir. 1985)).

C. Adjustment for Intended Loss

Mutuc argues that the trial court erred by enhancing his sentence under United States Sentencing Guideline § 2B1.1. He claims that the loss should be calculated at zero dollars because he intended to force his former wife to pay the debt, as was required by their divorce and because, he says, he intended no loss be visited upon his creditors. The

argument is unpersuasive.

A district court's calculation of the intended loss is reviewed for clear error. *United States v. Smith,* 332 F.3d 455, 457 (7th Cir. 2003). The application of that fact to the Sentencing Guideline is then reviewed de novo. *Id.*

Under U.S.S.G. § 2B1.1(b) loss is to be calculated as the greater of "actual loss" or "intended loss." U.S.S.G. § 2B1.1, application Note 2(A). This court has held that the proper loss calculation in bankruptcy fraud cases is the amount of the debt that the defendant sought to discharge in bankruptcy. *United States v. Holland,* 160 F.3d 377, 381 (7th Cir. 1998).

Defendant argues that "the relevant understanding of values for the purposes of determining the intended loss under the sentencing guidelines is that of the criminal, not that of the victim." (Br. of Def.-Appellant at 35-36) (quoting *United States v. Fearman,* 297 F.3d 660, 661 (7th Cir. 2002). We agree with defendant that his state of mind is the relevant benchmark. He states that his "intention was to force his ex-wife to honor the marital settlement agreement, reduced to judgment in the divorce court, obligating her to pay the marital debts as agreed and ordered by the divorce court." But the fact shows that Mutuc filed for bankruptcy in order to discharge a debt of more than $30,000 and less than $70,000. It is undisputed that he intended to leave the creditors with the false impression that he had insufficient funds to pay his debts. A successful discharge in bankruptcy would

have left the creditors without recourse against Mutuc; it follows that Mutuc intended a loss equal to the amount to be discharged in bankruptcy. While Mutuc may have intended that his creditors be paid, his overall intent was that he would not be the one to pay. The adjustment will stand.

D. Adjustment for Perjury

Defendant asks that the two-level adjustment under U.S.S.G. § 3C1.1 for perjury be vacated. He says that the government failed to abide by the district court's standing order governing objections to the presentence investigation report and the district court failed to specify particular instances of perjury. Neither of these arguments are bourne out by the record.

The first portion of Mutuc's argument complains that the government failed "to abide by the District Court's standing order requiring the Defendant to be provided notice of what statements would be used against him." (Reply Br. of Appellant at 13.)

In an order entitled, "Order Governing Objections to the Presentence Investigation Report and Motions for Departure from the Sentencing Range Under the Guidelines," the district court imposed the following requirements:

> As to any factual matters contained in the presentence report which are disputed, the party who objects to the facts as contained in the report shall file a written objection/correction . . . . A copy of the

> objection /correction shall be served on opposing counsel and the defendant.

(R. on Appeal at 50.) A similar instruction was given for objections to the calculations made by the probation officer. The government filed no objection/correction to the presentence investigation report's treatment of the obstruction of justice enhancement.

The presentence investigation report, in relevant part, says:

> This officer was not present at court during trial and therefore, cannot determine whether the defendant willfully provided false testimony to constitute "material" matter that, if believed, would tend to influence or affect the issue under determination. In addition, this officer has not reviewed a copy of the transcript of the defendant's testimony. Therefore, the probation department does not have sufficient information to determine whether defendant gave false testimony and whether that testimony would meet the criteria for obstruction of justice, pursuant to § 3C1.1. Therefore, this officer will defer to the Court's interpretation of the defendant's testimony to determine whether the two-level enhancement is applicable.

(R. on Appeal 83.)

From the two passages above, it is clear that the government did not violate the standing order of

the district court. The presentence investigation report did not make a factual finding or calculation to which the government could object. The defendant's argument on this issue is meritless.

A related argument is Mutuc's claim that the government failed to notify him of its intention to seek an adjustment under U.S.S.G. § 3C1.1. This is simply untrue. The government's intention to seek the adjustment is stated on the eighth page of the "Government's Version of the Offense" and within the presentence investigation report itself. (R. on Appeal 83.) Mutuc even objected to the recommendation for adjustment on the fourth page of his "Supplemental Objection to Government Presentence Report." (R. on Appeal 76.) Mutuc was clearly informed that a decision was contemplated. See *United States v. Jackson*, 32 F.3d 1101, 1106 (7th Cir. 1994) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Finally, Mutuc takes issue with the district court's failure to annunciate any specific instances of perjury when it applied the adjustment. Instead, the judge said:

> I have said in this case in the past that Mr. Mutuc is one of two things. He is either a liar or he has managed to convince himself of the truthfulness of what he says even though it is painfully obvious to everybody it is untrue.
>
> . . . .
>
> But I don't see how you can read the

> transcript in this case and not come away with the unmistakable view that Mr. Mutuc didn't tell the truth. It is obvious that Mr. Mutuc didn't tell the truth. If there's anybody in the world who believes that he was telling the truth, it's only Mr. Mutuc.

(Sentencing Tr. 34-35.)

Mutuc did not object to the court's lack of specific findings at sentencing. He claims that he did object "on substantive and procedural grounds" by referring to his "Supplemental Objection to Government Presentence Report." This objection is insufficient. Because Mutuc did not object at sentencing, the issue is waived. See *United States v. Wade*, 114 F.3d 103, 106 (7th Cir. 1997); *United States v. Krankel*, 164 F.3d 1046, 1055 n.3 (7th Cir. 1998).

For the reasons stated above, we AFFIRM.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX E

NO. 07-3656

UNITED STATES COURT OF APPEALS
Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ERNESTO MUTUC,
Defendant-Appellant

Appeal from the United States District Court
Northern District of Illinois
Eastern Division
No. 04-06034
The Honorable David H. Coar, Judge Presiding

MOTION FOR CERTIFICATE OF APPEALABILITY

NOW COMES Defendant-Appellant Ernesto Mutuc ("Mutuc"), **pro se**, in the above entitled matter and does respectfully request this Court to issue a Certificate of Appealability so that he can

proceed with this appeal of his wrongful conviction. In support thereof, Mutuc resubmits the attached (Exhibit A) Motion for Certificate of Appealability denied by the District Court and offers the following for this Court's consideration regarding the District Court's additional arguments justifying its procedural ruling:

1. On September 26, 2007 the District Court issued an Opinion and Order denying Mutuc's Section 2255. On October 19, 2007 Mutuc filed a Motion for Certificate of Appealability ("COA") in District Court essentially arguing that procedural defaults cannot be the basis for the denial when the issues raised resulted in a wrongful conviction and a fundamental miscarriage of justice. Mutuc had shown actual innocence and had argued that the jury could not have reached a guilty verdict if not for the perjured testimonies and constitutionally flawed Government's case which was helped along greatly by prosecutorial misconduct, court errors, and ineffective assistance of defense counsel. Please refer to attached Exhibit A.

2. On October 30, 2007 the District Court denied the COA utilizing evasive and convoluted logic in an attempt to justify its decision. First the Court states that "***Petitioner [Mutuc] moves this court to issue a COA on the finding that two of his claims were procedurally defaulted because they were not raised on direct appeal.***" Mutuc had in fact moved the Court to issue a COA because ***"a complete and grave miscarriage of justice had already occurred."*** Mutuc then proceeded to argue that ***"the Court's refusal to consider the***

Constitutional issue would [further] result in a fundamental miscarriage of justice." Mutuc had substantially shown that the entire Government case, founded on the perjured testimonies of two key Government witnesses, had in fact violated his Fifth and Sixth Amendment rights to due process and a fair trial. (See Exhibit A, Legal Standard and Analysis, page 18 ff.).

3. The Court also states that Mutuc ***"must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his part".*** The Court further states that: ***"The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong".*** The Court then argues that the constitutional issues were not raised on direct appeal because the specific form and nature of the instances of constitutional violations cited did not match properly with the instances cited in the Section 2255.

The Court certainly did not find the Section 2255 frivolous or it would have dismissed it on day 2. And the Court had easily dismissed Mutuc's "good faith" arguments – which, like any other defense, could either be very weak or extremely powerful as to result in a constitutional violation if denied - without even referencing the "good faith" defense issue itself. Mutuc had in fact shown good faith based on very specific legal grounds dictated by the Divorce Court itself in seeking bankruptcy protection. A COA should therefore issue based on the very nature and gravity of the constitutional

violations claimed. In this Court's very own words, ***"the petitioner need not demonstrate that he will prevail"*** in order to receive a COA.

4. Any further discussion on item 3 above is irrelevant because Mutuc had already substantially demonstrated in items1 and 2 above, in both the Section 2255 and COA, that a fundamental miscarriage of justice had occurred resulting in the wrongful conviction of an innocent United States citizen. Nevertheless it is important to dwell on this Court's reasoning a bit longer because it insists that ***"its finding of procedural default is correct and not debatable based on the record"*** when it refuses anyone even a peek at the record itself. In fact, in Slack v. McDaniel, 529 U.S. 473, 484 (2000), the applicant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong after a habeas application has been denied ***"on its merits"***, not on procedural default.

This Court has weighed its decision on a scale of justice which has an ounce of a golden nugget of a "procedural default" from its ready arsenal of findings on one side of the scale, and a one ton brick of a constitutionally flawed Government case on the other side. This Court, through sheer force of logic, has concluded that the ounce of golden nugget is heavier than the ton of brick, and that the wrongful conviction of an innocent person is not worth even a second look because the specific instances of constitutional violations in the Section 2255 did not match the specific instances cited on direct appeal.

But then this Court's golden nugget is not really gold but a "fool's gold" after all. The Section 2255, as well as the direct appeal, had raised very serious constitutional issues regardless of the divergence on some of the specific instances mentioned. First the Court pared down the issues to its most innocuous form. Then the Court misconstrued and dismissed Mutuc's point when Mutuc drew a parallel between defense counsel's failure to file ***"in Limine motions to challenge the Government's offering of expert testimony concerning stock options through lay witness Stravinskas and Pritikin"*** (Appellant Brief, page 25-26 and Appellant Reply Brief, page 1) and the Government knowingly and willfully allowing perjured testimony from the same witnesses at trial. The Appellant Brief had in fact argued that ***"Even more devastating, he (defense counsel Fennerty) did not move in Limine to prevent Pritikin from re-arguing his case that Appellant had committed divorce fraud. This theme [divorce fraud] was carried by the Government throughout the case, yet Fennerty failed to object. Pritikin's testimony is rife with examples of improper evidence – particularly concerning the issues of how many stock options were disclosed to Pritikin in the divorce case in 1994. Fennerty sat on his hands while Pritikin and the Government argued a case of divorce fraud."*** And again in the Appellant Reply Brief, page 1 ff.

Clearly the direct appeal was well justified in requesting the Honorable Court to vacate and set aside Mutuc's conviction. And clearly this Court is

now bent on insulating Pritikin from the constitutional violation claims made in the Section 2255 at the expense of Mutuc's rights and the Constitution itself.

5. On ineffective assistance, Mutuc had cited Massaro v. United States for the wealth of considerations accorded a defendant because a defense counsel would naturally sugar-coat his or her own shortcomings, and because a new appellate counsel would have to work within the limits of the trial record, on direct appeal. Mutuc can see the wisdom of the Supreme Court and Seventh Circuit Jurists when they see the merits of raising the issue first on direct appeal and then expanding on the issue on a subsequent appeal. The first would demonstrate that a valid claim (of ineffective assistance) truly exists, and the second could give justice to a defendant's rights to a fair trial if the claim was denied on direct appeal. Clearly Mutuc had called this Court's attention (in the COA) to the fact that in Massaro, ***"the 2nd and 7th Circuit have made their view clear that claims of ineffective assistance are no longer valid if not previously raised on direct appeal."***

As Fennerty had admitted to Appellate Counsel later, he had decided on his own not to mount a positive defense against Pritikin. Appellate Counsel saw this strategy as more damning to Mutuc's constitutional rights than Pritikin's own actions. This, plus Fennerty's failure to secure the good faith jury instructions (Appellant Brief, page 21), Fennerty's failure to follow even the most basic ethical and legal principles concerning a conflict

between attorney and client over the representation (page 24), the fact that Fennerty had simply given up on the case and had told the Court at sidebar that he was only going through the motions of defending his client (page 23), and in Fennerty's total failure to impeach Mutuc's divorce and bankruptcy attorney Jonscher and the Government's violation of the Fifth Amendment and the attorney-client privilege by engaging in direct contact with Jonscher during the bankruptcy proceedings without Mutuc's knowledge or permission, and without a waiver (Appellant Brief, Appellant Reply Brief, the Sentencing Hearing, Motion for Bail Pending Appeal, etc.).

Unfortunately, in its erroneous finding that Stravinskas merely explained a business record generated by her department and Pritikin essentially explained the nuances of divorce proceedings (Decision on Appeal, page 5), the Honorable Court failed to be convinced that there was indeed ineffective assistance.

The Section 2255 had recast the entire Government case and trial into its true and proper perspective. In this particular appeal, Mutuc will further focus on both the perjured testimonies and ineffective assistance as they permeated the entire Government case and prosecution that resulted in a wrongful conviction from a blindfolded jury. For the perjured testimonies of Stravinskas and Pritikin are not matters for procedural debate but a matter of felony obstruction of justice that shaped and colored the entire Government case and directly affected the jury verdict – with the active and malicious role Pritikin played in the non-payment of the creditors

from the $36,890 already surrendered by Mutuc in the divorce and the $18,000 due Mutuc that Pritikin had appropriated to pay himself, a grand total of $54,890 against the unsecured non-priority claims total of $46,349 or $51,427 if Schedule E is included. And the ineffective assistance of Fennerty is not the stuff of Monday morning quarterbacking but, in Appellate Counsel's own assessment, was attorney malpractice for taking the proverbial dive at trial. (Appellant Brief, page 25). This appeal will also point out that these two issues did not happen independently of each other and simply by chance, as Mutuc had already started to point out in the Section 2255.

WHEREFORE, it is respectfully requested that the foregoing Motion for Certificate of Appealability be granted.

Respectfully submitted this _____ day of November, 2007.

Ernesto Mutuc, Pro Se
1900 Wilmette Ave
Unit 4B
Wilmette, Illinois 60091

VERIFICATION

I, Ernesto Mutuc, certify that I have read the contents of the above Motion for Certificate of Appealability, and I attest that the contents are true and accurate to the best of my personal knowledge. Executed on this _____day of November, 2007 under penalty of perjury.

_____
Ernesto Mutuc
Petitioner Pro Se

Subscribed and sworn to before me in _____, Illinois on this _____ day of November, 2007, affiant exhibiting to me his Illinois Driver's License Number M320-2074-1252 expiring on 09-04-11.

_____

(Signature of Notary, title)

EXHIBIT A follows:

(See Appendix F)

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ERNESTO MUTUC,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

HONORABLE DAVID H. COAR
NO. 04 C 6034

MOTION FOR CERTIFICATE OF APPEALABILITY

NOW COMES Ernesto Mutuc, Petitioner/Defendant ("Petitioner"), **pro se**, in the above entitled matter and does respectfully request this Court to issue a Certificate of Appealability in the above referenced matter. In support thereof, Petitioner states the following:

On September 26, 2007 the District Court

issued an Order denying Petitioner's **Section 2255 Motion** in which Petitioner had argued that the Government's case, not partly but in its entirety, violated his constitutional rights to due process and a fair trial by jury. Furthermore Petitioner had argued that the jury could not have reached a guilty verdict without the perjured testimonies, prosecutorial misconduct, and court errors supporting the Government's straw-man case. The District Court's Opinion and Order is so markedly narrow and dismissive, so lacking in its explanation of the reasons for the denial, and so one-sided in favor of the Government's case (in a collateral appeal that specifically showed the case as constitutionally flawed) that Petitioner has no choice but to present a direct rebuttal, starting with the Statement of Facts. Yes the Court may draw all reasonable inferences from the facts in a light most favorable to the Government's case, but not omissively, selectively, and at the expense of an individual's rights and the Constitution of the United States of America.

I. STATEMENT OF FACTS

It is wrong for the Court to bring up the role of the former wife and altogether omit her lawyer's role in the failure to pay the creditors when Petitioner had specifically and pointedly argued in his Section 2255 that the former wife's lawyer, attorney James B. Pritikin, was actually the sole and primary cause of the non-payment of the parties' debts and the sole accuser and primary catalyst in the bankruptcy petition. The former wife, like Petitioner, was simply following the instructions of her attorney and the intentions of the divorce court as explained to her by

her attorney. She had no role in the bankruptcy or the criminal case other than the fact that she was the other named party in the divorce which Pritikin had maliciously dragged into the federal courts and adversarial proceedings with his false charges of divorce and bankruptcy fraud. She had in fact told Pritikin not to pursue the matter of the unfounded charges of divorce fraud.

Pritikin, as a creditor in the bankruptcy and informant-accuser-witness in the criminal case, had indeed brought the false charges of divorce and bankruptcy fraud to the attention of the U.S. Attorney and had lobbied for Petitioner's indictment and conviction. Pritikin - hiding behind his client's name and falsely claiming to be the protector of child support when this was never an issue in the Mutuc divorce – first caused Petitioner's employers Computer Associates to withhold the funds due to his unacceptably written Qualified Domestic Relations Order (QDRO), thus the failure to pay the creditors. (See Section 2255 Reply Brief, Appendix E). He continued to fail to pay the creditors from existing and available court-ordered funds that Petitioner had already surrendered to the court during the entire time that he was prosecuting his personal vendetta against Petitioner in the bankruptcy and criminal courts. The only creditor he paid was his-self, appropriating the $18,000 that was due the Petitioner from his client almost two years before the reopening of the bankruptcy case in which he was again paid his attorneys fees, and again from funds in the preempted divorce court litigations.

The divorce proceedings had indeed provided for reciprocal releases and indemnity agreements for the spousal debts. Petitioner had however already advanced substantial payment amounts towards the marital debts while he fought Pritikin over the $36,890.56 that Computer Associates had put on hold (under cited IRS and ERISA code provisions) awaiting Pritikin's response. The Divorce Court had in fact ordered, as part of the QDRO that Pritikin finally revised three years after the divorce, that the $36,890.56 be used for its originally purpose which was to reduce the debts of the parties. And since Pritikin's attorney's fees were precluded by the divorce agreement itself (See Government Exhibit Mutuc Divorce 2, page 13), and already paid for from the $18,000 that he had appropriated from the divorcing parties, there was no reason for the bankruptcy court not to utilize the court-ordered $36,890.56 amount to pay off the remaining $35,537 (See Government Exhibit Mutuc Bankruptcy File 1, Schedule F – total $46,349 minus $10,812 court-ordered attorney's fees) instead of the real property which was the primary residence of Petitioner and his family. The $5,078 student loan for the divorcing parties' son still remained to be paid from a refinancing of the marital residence valued at $181,750 on 8/31/93 (See Government Exhibit Mutuc Divorce 1 third page) as agreed upon in the divorce settlement. And since Petitioner knew that the student loans would be paid eventually, Petitioner's priority was to provide for his children's immediate and continuing education first. (See also Government Exhibit Mutuc Divorce 2, page 8).

Petitioner, on Jonscher's instructions, provided

Jonscher with an incomplete filing and conducted a long distance dialogue with Jonscher to complete the forms while Petitioner was on a work assignment in Florida. Jonscher decided on the chapter 7 petition, provided the totals, dated the forms, and filed the bankruptcy.

Petitioner's take-home pay based on the content of his payroll stub was indeed $1,560.28. His total monthly expense, estimated in good faith in Schedule J, was $3,463.70. This was in fact more conservative than his total monthly expenses reported in divorce court litigations, and was not challenged in the divorce, in the Rule 2004, by the Trustee, in the FBI investigation, and at trial.

Moreover, this monthly expense amount did not even include debt service payments to creditors. Petitioner had in fact filed for bankruptcy because child support was terminating after the minor son's graduation around June of 1998; and with the motion to terminate spousal support already in process, creditor garnishments to his salary would have been immediate. (See Section 2255 Reply Brief, Appendix B).

This is precisely why the Government's straw-man case, propelled by Pritikin's personal vendetta against Petitioner, was wrong and a violation of Petitioner's constitutional rights to due process and a fair trial. The Government had argued that Petitioner should have paid the Creditors first at the time of the divorce from stock options valued at over $250,000, or at the time of the stock options exercise. The stock options however did not have any value at

the time of the divorce, and had already been assigned to a third party more than three years before the bankruptcy. The Government's lamentations to the jury that the poor Creditors should have been paid first from the stock options belittle Petitioner's responsibility to provide for his family and the education of his children. He had managed to provide housing for his family but his own income alone was not enough for basic living expenses and the education of his children: one entering medical school, another just starting college, and a third in a private parochial school in Chicago.

The $36,890.56 was also already transferred to the former wife in the same quarter as the bankruptcy filing and the Government's additional charge that Petitioner had greatly understated his worth was blatantly in error. Presenting a specially requested two-day snapshot of Petitioner's 401k quarterly statement which did not yet include the $36,890.56 deduction in order to prove this charge to the jury was prosecutorial abuse of power. (See Section 2255 Reply Brief, Appendices H, I and J).

Petitioner did not disclose the real estate in Schedule A as instructed by his bankruptcy attorney George Jonscher, who was also his divorce attorney. This was to be presented at the meeting of creditors, and here Petitioner's mindset mirrored the Court's opinion in the matter of Ruth, 31 C.B.C.2d 1050, 171 B.R. 789 Bankr.E.D.Mich.1994 in which the Court had held that: **"A Debtor may choose to avoid disclosure of information if the disclosure would harm the Debtor more than it would**

help the estate, but the choice should be in good faith based on a legal ground". This real property was already part of divorce court litigations, and in fact was on judicial hold and under the jurisdiction of the Divorce Court at the time of the bankruptcy because of Pritikin's Section 2-1401 Petition. Petitioner was the legal, but not the equitable, owner of the property because it was purchased from funds that had already been assigned to a third party at the time of the divorce, almost four years before the bankruptcy filing. And in cases before the bankruptcy court, charges of concealment of assets (if made) are always for non-disclosure in the bankruptcy schedules **or at the meeting of creditors.** (For example, In re: Robert A. Holstein; Jeffrey M. Goldberg & Associates, LTD, Ch 7 Case No. 00B18138).

Petitioner disclosed the stock options granted in 1995 in Schedule B, the only other options not assigned to the third party and the only other options granted at the time of the bankruptcy. The Section 2255 Additional Memorandum of Law had presented indisputable evidence that Stravinskas committed perjury and that the Government's additional charge of concealing the 1996 and 1997 options was false and an instance of prosecutorial abuse. (See Section 2255 Additional Memorandum, Exhibit – CA Admits to Backdating Stock Options). Asking the jury to consider a stock options report that included options granted well after the bankruptcy was also prosecutorial abuse of power. (See Government Exhibit Computer Associates 1).

Petitioner closed his money market account at

Northern Trust as instructed by Jonscher after Pritikin had informed Jonscher that he (Pritikin) would go after Petitioner's bank accounts for payment of his fees. The $15,914.43 balance from the property purchase was eventually transferred to an account hidden from Pritikin and later disclosed in the Bankruptcy Statement of Affairs. This amount, including reimbursement monies for business travel expenses, remained in Petitioner's Mid-Town checking account and was eventually utilized to pay off the balance of the more than $87,000 in income taxes owed to IRS from the exercise of the options in 1997. (See Section 2255 Memorandum of Law, Appendix B and Government Exhibit Mutuc Income Tax Return B). But for the income tax funds and travel expense reimbursements therefore, Petitioner's Mid-Town account was a zero balance account, with all the deposited take-home pay going towards living, job-related, education, and other basic family expenses. The Government's additional charge of not having a zero balance account was therefore wrong, and utilizing their witness FBI agent John Diwic to parade these amounts to the jury as Petitioner's personal finances is prosecutorial abuse. The Court's oral order denying Petitioner the right to present to the jury his checking account book and the $15,000 check to the third party, and on Government's objection that they did not have the time to study the evidence when they had brought the charges only on the day of the trial, was an abuse of discretion.

The total debt that had to be satisfied in the bankruptcy was $51,427 (Schedule E plus Schedule F) which Petitioner had maintained (and correctly

so) he had already paid with the $36,890.56 and $18,000 appropriated by Pritikin. The total amount of marital debts - as stated in the divorce Pre-Trial Memorandum at the time that Pritikin first appeared as counsel for the former wife in late 1992 - was in fact $52,875.70 ($117,993.05 minus the two mortgage balance amounts totaling 63,944.19 and $1,173.16 debt incurred after October 1, 1992). (See Bankruptcy Case No. 98B10579 Motion for Reconsideration, Exhibit K).

The $80,000 this Court introduced in the Opinion is nowhere to be found in the bankruptcy filing. If the Court is alluding to Schedule D, Petitioner had borrowed $20,000 plus $5,000+ in interest from his 401k Plan which he had properly entered as a court-ordered loan with an outstanding balance of $18,347. He had borrowed from himself solely because ERISA codes and Computer Associates policies would not allow him to withdraw his pension funds. He used the funds to reduce his debts, which was still the marital debts, in order to maintain good credit standing at least on some of the accounts he had to use in his extensive business travels as a software consultant. He borrowed to avoid bankruptcy, to follow Divorce Court orders, and to protect his job, not to mention his responsibility to provide for his family and the education of his children.

The Court's opinion that "it later became apparent that much of this information was false" given with no regard to Petitioner's arguments and evidence refuting the charges has no merit. And "Mutuc's stated reason for filing for bankruptcy" as interpreted by this Court is only correct in so far as

his effort was to have the provisions of the marital settlement agreement enforced so that he would not have to pay the debts a second time from funds essential to the support of his family and the education of his children. He had already been informed that he could not return to Divorce Court for relief until he had followed all the intentions of the Court, with bankruptcy as his last option.

Continuing with this Court's Facts, he presented his net worth in a manner consistent with his statements of income and expenses which was in fact thoroughly litigated in Divorce Court; by Pritikin and Jonscher nonetheless. The Court's statement that "Mutuc concealed various bank accounts" is blatantly wrong. He had declared his Northern Trust checking account and his Midtown Bank account in Schedule B and his Northern Trust money market account in the Statement of Financial Affairs. He did open a stock broker account with Charles Schwab to meet the requirements of the "cashless" exercise. (See Section 2255 Reply Brief, Appendix F, pages 5 & 6). Again this was part of divorce litigations to be presented to the trustee in the meeting of creditors. Whatever other financial accounts Petitioner may have at the time that he filed the bankruptcy forms were accounts automatically opened by Computer Associates to dispense other benefits and made known to Petitioner only later. The charge of concealing stock options was thoroughly refuted in the Section 2255 with a showing of facts proving that the Government's witnesses Stravinskas and Pritikin had lied to the jury under oath and committed perjury.

Petitioner's annual gross income was the same from the time of the divorce to the time of the bankruptcy. His final 1997 payroll document clearly stated that his year-to-date gross pay was $70,620; with the proceeds from the stock options exercise as a one-time benefit earnings clearly identified as 16 STOCK. (See Section 2255 Reply Brief, Appendix N). The Government had not submitted any evidence (and there was none to submit) that Petitioner had any other income. The real property, the stock options, the proceeds from the stock options exercise, and the stock options exercise itself, were presented to the trustee at the meeting of creditors. At this meeting an assistant trustee, a person completely unknown to Petitioner, explained to the Trustee in the presence of Jonscher and Pritikin through his counsel that the particular bankruptcy petition was part of the Petitioner's divorce settlement. It was only under these circumstances: and the fact that this was to meet the intentions of the Divorce Court; the fact that he had already surrendered the funds for the payment of the debts; and the fact that the funds were still available and at the disposition of the Divorce Court that Petitioner had filed for bankruptcy.

The Court's Opinion that Petitioner admitted to being the owner of the real property during the Rule 2004 deposition is completely wrong and extremely prejudicial. Petitioner had in fact only explained what was already in divorce court litigation; that he was the legal, but not the equitable owner of the property because it was purchased entirely from funds from the exercise of stock options that were already assigned to a third party. Moreover, Pritikin

had already promised his client at an earlier Divorce Court hearing prior to the bankruptcy that he would get the real property back to her. Pritikin then filed a Section 2-1401 claiming concealment of the stock options. He would falsely claim that the options were already valuable at the time of the divorce and could have been used to pay off the marital debts. Petitioner had filed a motion to dismiss, arguing that the former wife knew more about the worthless options than Petitioner and dismissing the Section 2-1401 as barred because it was filed well over a year after entry of the divorce judgment and agreement. Pritikin then made the same charges and testimony under oath in Petitioner's trial. This was shown and proven in the Section 2255 as perjured testimony.

Petitioner was a responsible father and hardworking provider whose marriage unfortunately ended in divorce. He fought all his legal battles within the judicial system and never took justice to himself. He fought Pritikin from day one because Pritikin's actions were always contrary to the welfare and well-being of his family. He was also forced to fight Pritikin because Pritikin always either lied directly to the courts or misrepresented Petitioner's actions and intentions. He did file for bankruptcy in order to protect his income and whatever rights he could manage to retain from the stock options he had already assigned to a third party. He did not however force the Trustee to discharge the debts, and was in fact prepared to have his bankruptcy petition denied so that he could go back to Divorce Court for relief.

Finally the Court's Opinion states that the Rule

2004 deposition was regarding the dischargeability of Pritikin's attorney's fees. Here the Court appears to be specially protecting Pritikin. While it was true that Pritikin had claimed that his attorneys fees were non-dischargeable, his Motion for Rule 2004 Examination was to jump-start the process of convicting Petitioner of bankruptcy fraud that would culminate in Pritikin's testimony and perjury at trial. The issue of "dischargeability" actually commenced later in a post-divorce action to collect the fees, and spilled over to a separate bankruptcy case.

Pritikin had already vowed that he would send Petitioner to jail as early as 1993 when Petitioner challenged his racist treatment of the divorce and refused to file for bankruptcy because of the marital condominium asset. Petitioner had fought the unconscionable divorce agreement and Pritikin's unethical conduct all the way to the Illinois Supreme Court with his Motion for Leave to Appeal in which he charged Pritikin with racial bias and to the Illinois Attorney Registration and Disciplinary Commission (ARDC). The following is what had actually transpired after Petitioner had filed for bankruptcy. Pritikin had the motive, the opportunity, and the means to convict Petitioner. He was successful, thanks to a too willing prosecution and a fawning defense counsel.

Pritikin immediately filed a motion to put all outstanding matters in Divorce Court on hold until the resolution of Petitioner's bankruptcy. The discharge of debt was entered on July 29, 1998; the Certificate of Mailing filed on July 30, 1998; and

Petitioner received his copy two or three days later. On August 3, 1998 Pritikin filed a **Motion for Rule 2004 Examination**. On August 4, 1998 Petitioner's bankruptcy case was closed and the Trustee dismissed. The **Order for Rule 2004** was entered on August 6, 1998. Pritikin's attorney conducted the Rule 2004 on August 27, 1998 after which Jonscher was immediately threatened with all kinds of legal and punitive actions. As it turned out, Pritikin was a hearing officer for claims against attorneys with the ARDC and had immediately filed a complaint against Jonscher with the ARDC.

On September 11, 1998 a **"Memorandum of Judgment Case Number 91D18957 in favor of Ernesto Mutuc and against Julie Mutuc, in the amount of (no amount shown) recorded 9/11/98 as document number 98812808"** was entered in the Real Estate Index for Petitioner's property. (See Government Exhibit 3410 N. Lake Shore Title History). Petitioner's former wife did not authorize this divorce action and denies any knowledge of this matter.

On October 23, 1998 Pritikin filed a Motion **for Sanctions Pursuant to Supreme Court Rule 137** against Petitioner and his attorney Jonscher. The motion stated that Pritikin had already filed a complaint against Jonscher with the ARDC. On October 28, 1998 Pritikin filed a **Motion for Garnishment** against Petitioner and his former wife for the payment of his attorney's fees from the $18,000, not in Divorce Court but in **Cook County Municipal Court**, but still using the Mutuc divorce docket case number 91D18957. Petitioner

subsequently filed a **Motion to Quash**, arguing that the attorney's fees were dischargeable debt. Pritikin then falsely claimed in Municipal Court that the bankruptcy court had already adjudged his fees as non-dischargeable debt. Petitioner produced a bankruptcy court transcript disproving this claim. The Municipal Court then ordered both parties to have the bankruptcy court determine the dischargeability of Pritikin's attorney's fees. On February 25, 1999 Petitioner filed an Adversary Complaint following instructions from the office of the Courtroom Deputy to Judge Susan Sonderby of the bankruptcy court. This became case number 99-00197. On March 19, 1999 Pritikin filed a **Motion to Dismiss.**

Pritikin won his case in Municipal Court on February 17, 1999 while Petitioner was on an extended work assignment in Panama City, Panama, arguing in court that Petitioner had failed to prosecute his case. This after the Municipal Court had specifically instructed Pritikin to work with Petitioner on the case schedule because of Petitioner's overseas assignment.

On March 25, 1999 the bankruptcy court allowed Pritikin's Motion to Dismiss **without prejudice**. This was incorrectly entered in the 99-00197 docket as an order **with prejudice**. Quite notably, Petitioner again had caught Pritikin on a lie that the Municipal Court had adjudged his attorneys fees as non-dischargeable. However, instead of dismissing Pritikin's claims, the bankruptcy court simply told Petitioner that it would rehear Petitioner's case only if Petitioner could get an order in Municipal Court

reversing its decision to award Pritikin's fees. Case Number 99-00197 on the dischargeability of Pritikin's fees was closed on March 26, 1999. Petitioner's motion for time to retain counsel was denied in Municipal Court on Pritikin's circuitous argument that Petitioner was already procedurally barred from any motion to reconsider.

On January 30, 2001, almost two years later and over two years after the discharge of debt, the **Motion for Order Reopening Case and Authorizing the Appointment of a Chapter 7 Trustee** (Case No. 98-10579) was entered in bankruptcy court. The introduction to the Trustee's **Motion for Compensation and Reimbursement of Expenses** states that: **"On February 6, 2001 this Court granted a motion filed by the United States Trustee to reopen the debtor's case to allow, inter alia, the sale of the condominium"**. The sale of the primary residence of Petitioner and his family was already the primary objective for reopening the case. Despite the divorce agreement and the fact that Pritikin was a consultant to the Trustee in the reopened bankruptcy, the provisions for paying the debts from the marital assets at the disposition of the Divorce Court were never considered.

Petitioner had also directed the District Court to the total violation of his constitutional rights to due process in the reopened bankruptcy in which his attorney Michael D. Walsh had strongly counseled him not to attend the second meeting of creditors and that he (Walsh) would **"take care of everything"**. It was only much later that Petitioner

had found out that Walsh did not even attend the meeting of creditors on his behalf, and had not filed any counter-motion or argued the case in court. (See Section 2255 Second Motion for Summary Judgment with appended Motion for Contempt in Bankruptcy Court).

Within this extended period between the closing and reopening of the bankruptcy case, Petitioner continued in his extensive travels as a computer software consultant, paid off the balance of over $87,000 in income taxes from the sale of the options, and continued in his role as head of his household which included the children from the divorce. He continued to work out other financial arrangements with the third party in the stock options contract, but did not discuss the bankruptcy or any related matter with her because of the ongoing FBI investigation.

Also within this period, and unbeknownst to Petitioner, the Government had conducted a full investigation and interrogation of Jonscher without a waiver in violation of the attorney-client privilege. The result was a plea bargain in which Jonscher got a slap on the wrist for the failure to declare the $18,000. Later at trial, and as a hostile defense witness, he would deny any knowledge of Petitioner's financial affairs. Both the Government and Petitioner's defense counsel would silently endorse this huge stretch of logic already exposed and attacked in the direct appeal and again in the Section 2255.

The charges in the indictment were false and

unfounded, and obtained in a grand jury hearing that was also grounded on the false divorce fraud charges of non-existent assets and non-existent documents. The Government presented to the jury a straw-man case around the perjured testimonies of Stravinskas and Pritikin. Their entire binder of evidence contained public documents that were already part of divorce court litigations and explained by Petitioner to the FBI agent investigating his case. The closing and rebuttal arguments by the AUSAs, grounded on the perjured testimonies and distorted facts, advanced conclusions and summaries that further distorted the truth such as the statement that Petitioner had schemed to have the divorce agreement signed and entered. The agreement was in fact entered over the strong objections of Petitioner and his then divorce counsel, and there was no place for the signatures of the divorcing parties. (See Government Exhibit Mutuc Divorce 2, page 14). The Petitioner was denied his constitutional rights to due process and a fair trial. He was wrongfully convicted and wrongfully sentenced. These are the facts of the case and the substance of the Section 2255.

II. LEGAL STANDARD

Petitioner agrees with the standards offered in the Opinion. Additionally, there are two exceptions to the procedural default rule: (1) if the movant demonstrates cause for failing to raise the issue and actual prejudice resulting therefrom; or (2) the court's refusal to consider the Constitutional issue would result in a fundamental miscarriage of justice, which requires a showing of actual

innocence. See Belford, 975 F.2d at 313; see also McCleese, 75 F.3d at 1177-78 (discussing fundamental miscarriage of justice).

Furthermore common sense and the United States courts have always held that decisions based on a reliance on impermissible considerations, a failure to exercise discretion, or on false information would be the subject of fact-finding and could be reversed. The courts have also held that the true facts denied the jury by false, perjured, and coerced testimonies is equivalent to newly discovered facts for the court's consideration, and a defendant is never precluded from a review of the prejudice associated with lies and perjury and can raise these issues in any forum and as often as the defendant can.

III. ANALYSIS

1. THE COURT DISMISSES CLAIM (1) AS PROCEDURALLY DEFAULTED BECAUSE IT WAS NOT RAISED ON DIRECT APPEAL.

The Section 2255 had however fully demonstrated that a complete and grave miscarriage of justice had already occurred. And while this instant case may not be considered an extraordinary situation by this Court because it is accustomed to dealing with murderers and drug dealers and jail sentences of twenty years to life, it is very extraordinary for Petitioner who has been denied his constitutional rights and wrongfully convicted by

officers of the court in a bogus prosecution, driven out together with his family from their place of residence when there were already other assets surrendered by Petitioner for the payment of the debts, and lost his job and a substantial amount of future income, not to mention the innumerable and immeasurable emotional harm the spurious prosecution and wrongful conviction had visited upon him and his family.

The Government case was one third perjured testimonies over non-existent assets and non-existent documents, one third facts that were already in the public record and not disputed by Petitioner, and one third distortion of facts from false and improper evidence. The Government's paper trail and closing and rebuttal arguments, based on the bogus and spurious case, further distorted the truth and advanced conclusions that in themselves obstructed justice and blindfolded the jury.

Petitioner had explained the facts surrounding the divorce and the bankruptcy to the FBI agent investigating the case. The FBI agent told Petitioner that he did not believe Petitioner's explanation, and threatened Petitioner with exposing his fraudulent paper trail in the Chicago papers. The Government nevertheless did not charge Petitioner with any instance of lying to the prosecutors in the federal investigation. The Government would however charge Petitioner with new instances of fraud at trial which Petitioner had proven to be completely false in the Section 2255.

The Government equated non-disclosure in the schedules with fraud, and challenged Petitioner's version of the first meeting of creditors without producing the Trustee or the assistant trustee. They ignored the fact that Petitioner had started by offering the Trustee the stock options contract (Government Exhibit Saquido 4) and had deferred to the assistant trustee regarding the divorce matters presented in the presence of Jonscher and Pritikin. Petitioner was in fact already on notice by the Divorce Court not to sabotage the expressed intentions of the Court.

On the basis that Petitioner had already successfully committed divorce fraud, the Government presented to the jury Petitioner's stock broker transactions, bank statements, and income tax returns as proof of the bankruptcy fraud committed in order to perpetuate the divorce fraud. (See Government Exhibits: Schwab, Northern Trust, Chicago Title, Mid-Town Bank, Mutuc Income Tax Returns, etc.). Quite notably, there were no other asset concealment charges such as putting the title on a different name, or establishing complicated account structures to hide the paper trail. The District Court had obliged the Government that the evidence would be weighed by the jury solely on "Intent to Defraud", denying Petitioner's motion for the "Good Faith" instructions.

The Section 2255 further identified other Court errors and abuse of discretion regarding jury selection, specific rulings at trial, and at sentencing. The Section 2255 should have been decided on its merits regardless of whether the issues were raised

or not raised in direct appeal.

Nevertheless, it is also not completely accurate and true that the constitutional violations were not raised in direct appeal. The direct appeal had in fact pointed out the **"role Kanealy's attorney, James Pritikin, played in driving Appellant (Petitioner) toward financial disaster"** and that **"These pressures, coupled with an incompetent bankruptcy attorney and an asleep at the switch defense lawyer in the criminal trial, have, simply put, resulted in a miscarriage of justice and landed a model citizen behind bars"**. (Appellant Brief, Appeal No. 03-1116, Summary of Argument at page 14). The post trial motions on sentencing, the Motion for Bail Pending Appeal, the Appellant's Brief and Reply Brief to the Government's Response in the direct appeal all raised specific issues of the denial of Petitioner's rights to due process and a fair trial. For the District Court to reduce this to a finding that the Section 2255 is procedurally defaulted because Petitioner did not raise the perjured testimonies and new charges at trial in the direct appeal -- the foundation of the Government's entire case and the springboard on which Petitioner launched his issues regarding the violation of his 5th and 6th Amendment rights - misses the entire point of the direct appeal and the Section 2255.

Furthermore the direct appeal, in Appellate Counsel's own words, focused on matters of law and raised the issue that the divorce fraud, advanced by Pritikin, should have been the subject of In Limine motions and should have not entered into trial. The

direct appeal also raised the issue of calling Stravinskas and Pritikin as expert witnesses. The Appellate Court was in error in its finding that Stravinskas simply explained a report provided by Computer Associates and that Pritikin simply explained the nuances of divorce court proceedings. Essentially therefore, the Section 2255 exposed the false and extremely prejudicial foundation of the Government case while the direct appeal argued that the foundation should not have been there at all at trial. In following up this false trail pursued by the Government and affirmed by the Appellate Court, Petitioner provided proof that there was no divorce fraud, that the testimonies of Stravinskas and Pritikin were perjured and obstructed justice, that the Government's case presented to the jury was fundamentally flawed and defective, and that Petitioner was wrongfully convicted.

2. **THE COURT DISMISSES CLAIM (2) AS PROCEDURALLY DEFAULTED BECAUSE HE DID NOT ARGUE THAT HIS RIGHT TO A JURY TRIAL WAS VIOLATED IN SENTENCING.**

Here the District Court takes a very narrow position and appears to advance a new literal meaning of the law. The Court appears to be saying that it is not enough to appeal an improperly imposed sentence that the Court had allowed without a factual finding on the "intended loss" and "obstruction of justice" enhancements; the direct appeal should have been briefed in the same manner and style as **Blakely.**

First, The Court characterizes Petitioner's issue as an argument against a sentence calculated in error and that falsified information at trial gave him cause and prejudice for the failure to raise the claims on appeal. Then the Court dismisses the argument because the failure cannot simply be explained by the false information presented at trial. This is not however the case, and the sentence enhancement challenge was raised as part of a larger issue of the violation of Petitioner's rights to due process and a fair trial due to, among others, gross legal malpractice, ineffective assistance, Trial Court error in interpreting Rules of Professional Conduct, and Trial Court error in refusing to grant the Good Faith jury instruction. The direct appeal specifically pointed out **"the due process problems created by the Government's failure to do its job at sentencing".** (See Reply Brief of Appellant, page 14).

There was not just false information presented at trial. The direct appeal, addressing a Government case of "Intent to Defraud", had in fact raised the issue that there was no intended loss to the creditors, in addition to the fact that the sentence calculation was in error. It also argued that **"It is contrary to the law of this United States Circuit to ignore the existence of Appellant's rights under the marital settlement agreement and forego an examination of the true harm Appellant actually intended to inflict.** (Appellant Brief at page 37).

The direct appeal also argued that Petitioner's

testimony providing his own version of the case did not obstruct justice; and that the Government not only did not present this offense to the jury at trial, the Government actually refused to have this issue heard at sentencing. The Government refused to detail the obstruction of justice offense in order to avoid any further scrutiny of their case, and of the conviction itself. The direct appeal concluded that the additional punishment accomplished nothing **"other than to chill the absolute statutory right to take the witness stand in his own defense – a right which has been found to be implied in the constitution."** (Appellant Brief at page 40).

Absent the divorce fraud and the perjured and distorted testimonies, the Government's case is reduced to a charge of bankruptcy fraud based solely on the content of the bankruptcy forms. This in fact is the Government's sanitized version, and no jury would have convicted a head of a household who would have abandoned his responsibilities to provide for his family and the education of his children had he paid the Creditors first, the same Creditors he had already paid once before, and attorney James B. Pritikin who had won payment for his precluded fees by subterfuge in **Municipal Court** well before the reopened bankruptcy and criminal case.

Petitioner's Section 2255 raised the enhancement issues as major components of a straw-man case that turned the role of the jury to a rubberstamp for the Government and caused the jury to wrongfully convict. And here Petitioner had pointed out that these very issues touch upon the heart of Petitioner's defense: 1) that the loss to the

creditors was zero dollars because he had already surrendered the funds to pay the debts, and because the Divorce Court retained jurisdiction over the divorce and could have paid the creditors from the surrendered funds even at the time of the wrongful conviction and sentencing; and 2) that it was the Government's case that was perjured and obstructed justice, not the Petitioner's version of the truth.

The direct appeal arguments on the sentencing enhancements anticipated, and were upheld by, the Supreme Court's decision in **Blakely.** The Section 2255 argued that the "Intended Loss to Creditors" and "Obstruction of Justice" enhancements, both of which were not proven to the jury beyond a reasonable doubt, was unconstitutional and violated Petitioner's Sixth Amendment Right to a fair trial. These arguments also reach well beyond **Blakely** and support a much larger challenge to a seriously constitutionally flawed Government case. The "procedurally defaulted" ruling therefore is a clear instance of abuse of the Court's power and discretion.

3. **THE COURT DISMISSES CLAIM (3) INEFFECTIVE ASSISTANCE OF COUNSEL AS PROCEDURALLY DEFAULTED BECAUSE IT WAS ALREADY ADVANCED AND REVIEWED ON DIRECT APPEAL.**

While there is precedent that claims decided by the appeals court have been barred in the absence of changed circumstances of fact or law, claims of

ineffective assistance raised by different counsel on appeal, and of facts based on record not developed at trial, have been allowed on collateral appeal.

On April 23, 2003, a unanimous Court reversed, holding that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under 28 U.S.C. Section 2255, whether or not a defendant could have raised the claim on direct appeal. (Massaro v. U.S._U.S._,123, S.Ct. 1690 (2003)). The Supreme Court recognized that procedural default rules are in place to conserve judicial resources and respect the law's important interest in the finality of judgments. It however argued that applying this rule to ineffective-assistance-of-counsel claims create the risk that defendant would feel compelled to raise the issue before there has been an opportunity fully to develop the claim's factual predicate, and it would raise the issue for the first time in a forum not best suited to assess the facts, even if the record contains some indication of deficiencies in counsel's performance.

Also, the 2nd and 7th Circuit Court justices have made their view clear that claims of ineffective assistance are no longer valid if not previously raised on direct appeal. (Also in Massaro v. U.S.) Other Opinions have argued that the District Court is a better forum for these matters rather than the Appeals Court when the original record is not conclusive. Clearly there is a multiplicity of opinions, but a clear consensus that the claim itself is the deciding factor. In this particular claim (3), coupled with constitutional violation issues of a bogus Government case and offenses not proven to the jury

beyond a reasonable doubt, the ineffective assistance of a trial counsel that did not prepare for trial, did not pursue any pretrial motions discussed with his client, did not present the defense case, did not or deficiently cross-examined witnesses, and did not present defense witnesses and defense evidence does not warrant a procedural default. The Section 2255 had presented substantial facts of ineffective assistance that could not have been brought up fully by new Appellate Counsel in direct appeal and Claim (3) is not the same issue decided on direct appeal.

The failure to call certain witnesses and ask particular questions that the Opinion pointed out was also not an issue of ongoing defense tactic or strategy. Defense counsel had taken an extremely well-documented case that already addressed the false charges and debunked the indictment. Counsel had already stated that he would call Pritikin as a witness had he not been called as a witness for the Government. Counsel had already avowed full knowledge of Petitioner's multi-prong defense from the voluminous file of memorandums and documents handed over to him by Petitioner, from the circumstances of the divorce to the circumstances of the bankruptcy filing. Defense Counsel James R. Fennerty even failed to bring up Jonscher's plea bargain with the Government at trial, pretending all along that he was helpless and frustrated with the fact that Jonscher had disavowed all knowledge of Petitioner's finances, the same finances Jonscher was litigating with Pritikin in Divorce Court.

The strategy therefore was already set well before trial. (See Section 2255 Reply Brief,

Appendices K, L, & M). Changing the strategy at trial, and contrary to the defense case that he was hired for by Petitioner, was not only ineffective assistance. It was per se attorney malpractice.

Finally, the Opinion makes mention of a poor relationship between Petitioner and Fennerty. This obviously came about only at trial when it started becoming apparent that Fennerty was not presenting Petitioner's defense case. The rift was symptomatic of ineffective assistance and, if anything should have alerted the District Court to the highly prejudicial manner in which Petitioner was being represented.

IV. CONCLUSION

Petitioner had raised very serious claims of perjury and obstruction of justice, court errors, attorney malpractice, prosecutorial misconduct, and ineffective assistance and these claims must be directly addressed, not barred from this Court's considerations. Due process, the role of the jury, and the rule of law are extremely essential to the justice system in order to protect its citizens (especially of easy target minority groups) from accusers with their own malicious agendas, abuse and misconduct by Government prosecutors, and "ineffective" defense counsels. All three have converged in this instant case. What other "extraordinary situations..." was this Court looking for?

The Section 2255 had presented clear and undisputed evidence of the denial of Petitioner's constitutional rights that resulted in his wrongful

conviction. The Government's Response had completely omitted the perjured foundation of their case and simply reiterated the charges, arguing procedural defaults in defense of a "sanitized" version. The Government had also declined to respond to three subsequent Motions for Summary Judgment, Motion for a Ruling, and Additional Memorandum of Law because supporting the perjured testimonies would be further subornation of perjury and obstruction of justice on their part. Petitioner is a United States citizen and taxpayer of good standing outside of the criminal case he is now challenging. He is entitled to an Opinion that addresses the issues on its merits and gives the reasons for the decision.

WHEREFORE, it is respectfully requested that the foregoing Motion for Certificate of Appealability be granted.

Respectfully submitted this _____ day of October, 2007.

_____

Ernesto Mutuc, Pro Se
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Wilmette, Illinois 60091

VERIFICATION

I, Ernesto Mutuc, certify that I have read the contents of the above Motion for Certificate of Appealability, and I attest that the contents are true and accurate to the best of my personal knowledge. Executed on this _____ day of October, 2007 under penalty of perjury.

_____

Ernesto Mutuc
Petitioner Pro Se

Subscribed and sworn to before me in _____, Illinois on this _____ day of October, 2007, affiant exhibiting to me his Illinois Driver's License Number M320-2074-1252 expiring on 09-04-11.

_____

(Signature of Notary, title)